





From







# REPORT OF CASES

DECIDED IN THE

## COURT OF QUEEN'S BENCH,

BY

CHRISTOPHER ROBINSON, Q. C.,  
BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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VOL. XXII.

CONTAINING THE CASES DETERMINED  
FROM EASTER TERM 25 VICTORIA, TO TRINITY TERM 27 VICTORIA  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
AND DIGEST OF THE PRINCIPAL MATTERS.

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1882.

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J U D G E S

OF THE

COURT OF QUEEN'S BENCH,

DURING THE PERIOD OF THESE REPORTS:

THE HONOURABLE ARCHIBALD MCLEAN, and

” ” WILLIAM HENRY DRAPER, C. B., Chief Justices.

” ” ROBERT EASTON BURNS, J.

” ” JOHN HAWKINS HAGARTY, J.

” ” SKEFFINGTON CONNOR, J.

” ” ADAM WILSON, J.

” ” JOSEPH CURRAN MORRISON, J.

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*Attorney-General :*

THE HONOURABLE JOHN SANDFIELD MACDONALD.

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*Solicitor-General :*

THE HONOURABLE ADAM WILSON.

” ” LEWIS WALLBRIDGE.



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REPORT OF CASES  
IN THE  
COURT OF QUEEN'S BENCH.

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EASTER TERM, 25 VICTORIA, 1862, (*Continued.*)

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*Present :*

The Hon. ARCHIBALD McLEAN, C. J.

„ ROBERT EASTON BURNS, J.

„ JOHN HAWKINS HAGARTY, J.

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BROOKE v. McCAUL.

*Will—Construction—Estate for life or in fee.*

Under the following devise, testator having died in 1830 :—Touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form : first, I give and bequeath to P. B. two acres of land, (describing it ;) also, I give to Sophia, the child whom I have raised, one feather bed, &c., (naming other personal property ;) also, I give the remainder of my property, when my lawful debts are paid, to Sarah Brooke, my beloved wife.

*Held*, following *Hurd v. Levis*, 19 U. C. R. 41, that the widow took a fee in the land included in the devise to her.

**EJECTMENT.**—The plaintiff claimed the premises in question as heir-at-law of Peter Brooke, deceased, who was admitted to have been the owner in fee.

The defendant claimed as tenant of John Tomlinson, who claimed title under a deed from Sarah Cutter, widow and devisee of Peter Brooke, deceased. A special case was stated for the opinion of the court, in substance as follows :

It was admitted that Peter Brooke made a will, bearing date the 11th of January, 1830, in which, after some prelimi-

nary remarks as to the uncertainty of life, and recommending his soul to God who gave it, he proceeded thus: "Touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form: first, I give and bequeath to Peter Brooke, son of Jacob Brooke, two acres of land on lot No. 10, in the 9th concession of the township of Markham, in the north-east corner of the said lot. Also, I give to Sophia, the child whom I have raised, one feather bed and bedding, one cow, and five pounds in other household furniture when she gets married or arrives at the age of eighteen years. Also, I give the remainder of my property, when my lawful debts are paid, to Sarah Brooke, my beloved wife; and I do hereby utterly disallow, revoke, and disannul all and every other former testament, will, legacies, bequests. I make and ordain Jacob Brooke, and Sarah Brooke, my wife, to be my executors of this my last will, ratifying this and no other to be my last will and testament."

He died on the 15th of January, 1830.

Sarah Brooke, after the death of her husband, Peter Brooke, married one Cutter, who also died before her; and on or before the 9th of May, 1839, after his death, she conveyed the premises in fee to one John Tomlinson, who then entered into possession, and who remained in possession up to his death, the defendant being a tenant under a lease duly executed by him.

The widow, Sarah Cutter, died about the 10th of February, 1862.

The question for the court was, whether the plaintiff was entitled to recover under the facts stated.

*J. Duggan*, Q. C., for the plaintiff, cited *Denn dem. Moor v. Mellor*, 5 T. R. 558; *Doe dem. Mellor v. Moor*, 6 T. R. 175, 1 B. & P. 558, 2 B. & P. 247; *Doe dem. Jackson v. Ramsbotham*, 3 M. & S. 516; *Roe v. Daw*, *Ib.* 518; *Doe dem. Hickman v. Haslewood*, 6 A. & E. 167; *Doe v. Allen*, 8 T. R. 503; *Doe Pratt v. Pratt*, 6 A. & E. 180; *Doe Ford v. Bell*, 6 U. C. R. 527; *Moran v. Currie*, 8 C.

P. 60 ; Doe Stevens v. Snelling, 5 East, 87 ; Baby v. Baby, 1 U. C. R. 54 ; Doe Keefer v. Collins, 7 U. C. R. 519 ; Doe dem. Anderson v. Hamilton, 8 U. C. R. 302 ; Doe Humberstone v. Thomas, 3 O. S. 516 ; Goodright dem. Baker v. Stocker, 5 T. R. 13 ; Doe v. Richards, 3 T. R. 356 ; Smith v. Holmes, 14 U. C. R. 572 ; Lovelass on Wills, 284 ; Glover v. Spendlove, 4 B. C. C. 337.

*C. S. Patterson*, contra, cited Nicholls v. Butcher, 18 Ves. 193 ; Patton v. Randall, 1 Jac. & W. 189, 195 ; Bentley v. Oldfield, 19 Beav. 225 ; Footner v. Cooper, 2 Drewry, 7 ; Roe dem. Helling v. Yeud, 2 N. R. 214 ; Doe Booley v. Roberts, 11 A. & E. 1000.

McLEAN, C. J., delivered the judgment of the court.

I have had occasion to express an opinion in a case similar to this, but of more doubtful construction, in Michaelmas Term, 1859, and I have only to point to that case as conveying fully the opinion which I have formed in this. In that case, *Hurd v. Levis*, (19 U. C. R. 41,) since affirmed in appeal, I had not any doubt that the will conveyed the fee to the widow, giving her the lands and the ready cash, household goods, debts, and moveable effects, by her freely to be possessed and enjoyed. In that case, as in this, the testator professed to make his will "touching such worldly estate as it had pleased God to bless him with in this life." In this case the testator has devised other land to another devisee, and he has bequeathed personal property to a young girl whom he had brought up, and then he gave the *remainder of his property*, when his lawful debts were paid, to his wife, Sarah Brooke.

The restriction as to payment of debts, I think, shows that the intention of the testator was that his widow should take the residue of the estate subject to the payment of debts, and this also is a confirmation of his intention that she should take the land in fee. The decision in the case of *Hurd v. Levis* must guide us in holding that in this case the plaintiff is not entitled to recover as heir-at-law, and that a verdict must be entered for the defendant.

Judgment for defendant.

## RYERSE V. LYONS.

*Lease—Rent payable quarterly in advance—Construction.*

The plaintiff sued in covenant for three quarters' rent, alleged to be payable by the lease quarterly in advance. Defendant pleaded, as to the rent for the last quarter, commencing on the 1st of March, 1861: 1. That before the expiration of the first month of that quarter the plaintiff wrongfully evicted him. 2. That by a provision in the lease in case of the mill demised being accidentally burned the rent was thenceforth to cease, and that it was so burned on the 5th of March, 1861. 3. On equitable grounds, as to the rent subsequent to the 6th of March, 1861, the same provision in the lease, alleging the destruction of the mill by fire before the 6th.

*Held*, on demurrer, pleas bad, for the rent, being payable in advance, was due on the 1st of March, and nothing which occurred afterwards could divest the plaintiff's right.

DECLARATION, that the plaintiff by deed let to the defendant certain premises specified, for five years from the 1st of September, 1860, at \$900 a year payable quarterly in advance, which defendant covenanted to pay, but of which a balance of three quarters was due and unpaid.

*Fifth plea*, to so much as relates to the plaintiff's claim for rent in respect of one of the three quarters' rent in the declaration mentioned, being the quarter commencing on the 1st of March, 1861, the defendant saith that the said three quarters in the said first count mentioned commenced respectively on the first days of September and December 1860, and the 1st of March, 1861, and that during the quarter commencing on the day last aforesaid, and before the expiration of the first month of the said quarter, the plaintiff, without the consent and against the will of the defendant, wrongfully entered into and upon the mills and premises in the declaration mentioned, and evicted the defendant from the use and occupation thereof, and kept him so expelled thence hitherto.

*Sixth plea*, to so much of the declaration as relates to the plaintiff's claim for rent in respect of one of the three quarters in the said first count mentioned, being the quarter commencing on the 1st of March, 1861, the defendant saith that the said three quarters in the said first count mentioned commenced respectively on the first days of September and December, 1860, and the first day of March, 1861, and that it was and is provided and agreed, in and by the said alleged

deed, that should the said mills therein and in the said declaration mentioned be destroyed accidentally by fire, and not by neglect or carelessness, then in that case the said rent should thenceforth cease. And the defendant saith that the said mills were on the 5th day of March, 1861, and within six days after the commencement of the said quarter commencing on the first day of March aforesaid, in the year last aforesaid, accidentally destroyed by fire, and not by neglect or carelessness.

*Seventh plea*, on equitable grounds, as to so much of the declaration as relates to the plaintiff's claim for rent for or in respect of all or any part of the said term in the said first count mentioned subsequent to the 6th of March, 1861, the defendant saith that the said three quarters in the said first count mentioned commenced respectively on the first days of September and December, 1860, and the 1st of March, 1861, and that the plaintiff's claim in said first count includes a claim for rent for and in respect of a period of time subsequent to the said 6th day of March, in the year last aforesaid. And the defendant saith that it was and is provided and agreed in and by said alleged deed, that should the said mills therein and in said declaration mentioned be destroyed accidentally by fire, and not by neglect or carelessness, then in that case the said rent should thenceforth cease. And the defendant further saith that subsequently to the first day of March, 1861, and before the said 6th day of March, in the year last aforesaid, the said mills were destroyed accidentally by fire, and not by neglect or carelessness.

The plaintiff demurred to each of these pleas.

*Robert A. Harrison*, for the demurrer, cited *Hopkins v. Helmore*, 8 A. & E. 463; *Poole v. Tumbridge*, 2 M. & W. 226; *Hume v. Peploe*, 8 East, 168; *Chanter v. Leese*, 4 M. & W. 295, 311; *Clarke v. Holford*, 2 C. & K. 540; *Clarke v. The Glasgow Assurance Co.*, 1 MacQ. Scotch App. Cas. 668; *Vin. Abr. Vol. III.*, "Apportionment;" *Holtzapffel v. Baker*, 18 Ves. 115; *Bullen & Leake Prec.* 373; *Chy. Junr. Prec.* 351, 352.

*Richards*, Q. C., contra, cited *Newsome v. Graham*, 10 B. & C. 234; *Bennett v. Ireland*, E. B. & E. 326.

MCLEAN, C. J., delivered the judgment of the court.

It appears to us that all these pleas are bad. The plaintiff is asking for rent *due* to him according to the lease *before* the burning of the mill. He was entitled to receive it and could have distrained for it on the first day of March, or he could have sued for it on that day. A right of action was vested in him when default was made in the payment, and being vested nothing which subsequently occurred would divest it except payment. All rent becoming due subsequent to the burning ceased to be payable under the lease; but if such provision had not been inserted the plaintiff could have insisted on his rent being paid quarterly, notwithstanding the destruction of the mill by fire, and the defendant could not protect himself against its payment by pleading that it had been burned down or injured. He was not to be relieved from payment of rent by any other injury to the mill except burning not from carelessness or neglect. If it had been swept away or rendered useless by a flood, the rent would still be payable, or if the plaintiff were able to prove that the burning was wholly owing to neglect or carelessness—if, for instance, he could shew that the burning was owing to the defendant keeping the ashes from a stove in a box or barrel in the mill—the rent agreed upon could be enforced during the full period of the term.

The pleas do not set out any defence to the suit of the plaintiff, and judgment must be for the demurrer.

Judgment for plaintiff on demurrer.

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## LEE ET AL. V. WOODSIDE.

*Assignment—Money had and received.*

F. had a demand against one T. on notes and acceptances of about \$20,000. The plaintiffs agreed to transfer to him certain bank stock worth \$2,550, as a loan, to secure which he agreed to assign, and afterwards delivered to them, \$14,290 of these notes, all of which were negotiable, but some only were endorsed by F. T. failed in Lower Canada, and F. obtained these notes from the plaintiffs to collect there for them. F. subsequently executed an assignment to the defendant for the benefit of creditors, including these notes in the schedule attached to it, but stating in the deed that they were held by the plaintiffs as security for their loan. All the money recovered from T. on F.'s whole claim against him (about \$300 excepted) came into the defendant's hands.

*Held*, that the plaintiffs might recover from the defendant, as money had and received to their use, the amount of their loan out of the money received on the notes delivered to them as security; and if the amount paid by T. was paid generally on F.'s whole claim against him, then a sum founded on the proportion of such notes to the whole of T.'s debt.

ACTION for money had and received to the plaintiffs' use.

*Plea*.—Never indebted.

The case was tried at the last assizes held at Toronto, before *Burns, J.*, and the facts appeared to be these:—

On the 1st of June, 1860, D. K. Feehan entered into an agreement with the plaintiffs under seal, the material parts of which to this action were in these words:

“Whereas the parties of the second part” (the plaintiffs) “have agreed to transfer to the party of the first part” (Feehan) “sixty shares of the stock of the Bank of Upper Canada, amounting to the sum of three thousand dollars, as a loan to the said party of the first part. Now these presents witness, that in consideration of the said transfer of the said stock, the party of the first part covenants with the parties of the second part, that he will assign and transfer to them a debt due to him from Messrs. Thompson & Co., for the sum of fourteen thousand two hundred and ninety dollars, together with all notes, bills, or other evidences of the said debt, to have and to hold to the said parties of the second part as a security for the said stock transferred by the said parties of the second part.”

There were provisions about re-transferring bank stock, payment of interest, and principal, &c., not necessary to notice, and the agreement ended with this provision: “And the parties of the second part shall have the right to enforce

the said debt of the said Thompson & Co., or compound, compromise, or give time therefor, with the consent of the party of the first part, and on the re-transfer of the said stock, or the payment of the said money, the parties of the second part will re-convey to the party of the first part the said debt of the said Thompson & Co., together with the evidences thereof."

The evidences of the debt due by Thompson & Co. consisted of various promissory notes and acceptances of bills of exchange, some due at the date of the agreement and others not falling due until afterwards. These notes and bills were delivered by Feehan to the plaintiffs. Thompson & Company removed to Lower Canada, and there failed. It was admitted in this case that the law of Lower Canada was, in such a case, that such property of Thompson & Co. as remained in their hands, which had been sold by Feehan to them, but not paid for, and could be identified, would be liable for that particular debt, and that the demand of Feehan on production of the security would be there treated as a privileged debt.

On the 19th of October, 1860, Mr. Feehan obtained the notes and acceptances from the plaintiffs, giving them a receipt for them, expressing that it was for the purpose of handing them to a solicitor at Quebec for collection. The courts in Lower Canada dealt with them on the footing that Feehan was collecting them as his own.

The whole demand which Feehan had against the firm of Thompson & Co. consisted of notes and acceptances to the amount of \$20,446.52, of which the sum of \$14,290 was assigned to the plaintiffs, the remainder having been assigned to other parties, with the exception of \$2,123.44, which Mr. Feehan retained in his own hands.

On the 17th of December, 1860, Feehan executed a deed of assignment to the defendants, for the benefit of his, Feehan's, creditors, and in the schedule to the deed the notes and acceptances which had been previously delivered to the plaintiffs, and afterwards got from them by Feehan to take them to Lower Canada, were all enumerated, and it was stated that they were held by the plaintiffs as security for

an advance of \$2,550. That sum was the cash value the parties put on the 60 shares of bank stock transferred to Feehan, as the first agreement shewed.

Mr. Feehan was examined as a witness upon the trial of this cause, and stated that when he made the assignment to the defendant, he informed the defendant how the notes and acceptances stood pledged to the plaintiffs. He further stated, that in obtaining the notes and acceptances on 19th of October, 1860, to present them in Lower Canada, it was only done by him for the purpose of realizing the amount as a privileged debt in order that the plaintiffs might receive the money when collected. The amount realized in Lower Canada upon the whole debt of \$20,446.52, due by Thompson & Co., was \$3,615.86. Of this sum, \$3,337.87 found its way into the hands of the defendant, and the residue of the \$3,615.86 was paid over to other parties. The amount of \$3,337.87 was received by Mr. Feehan from the solicitor in Lower Canada in July, 1861; and he said he informed the solicitor there how the matter stood with respect to the plaintiffs, and when the money was received here he wished to pay over to the plaintiffs the proportion due them according to the amount of the notes and acceptances assigned to them, but the defendant would not consent, and contended that he being Feehan's assignee was entitled to the whole money, and that any demand the plaintiffs might have should be presented to him. Mr. Feehan stated that he thought the plaintiffs should receive their proportion, and that only the proportion of the \$20,446.52 which still belonged to himself should be paid over to the assignee. The defendant stated that he was acting under the advice of the solicitors of the trust, and insisted he should have the whole money, and it was then paid over to him.

It was admitted the defendant had the money still in his hands unappropriated, and that the plaintiffs had given notice to the defendant of their claim to the money before action brought.

A number of objections were made by the defendant's counsel to the plaintiffs' recovery, which were reserved as grounds of nonsuit.

A discrepancy existed as to the amount of notes and acceptances which had been originally given to the plaintiffs, and as to what had been returned from Lower Canada, and there not being time to analyse the matter at the trial, a verdict was taken for the plaintiffs for \$3,092.69, subject to be reduced if the calculation was not right.

*R. A. Harrison* obtained a rule to shew cause why a non-suit should not be entered on the following grounds: 1. That there was no proof of any assignment to the plaintiffs by Feehan of the debt due by Thompson & Co., or any part thereof, but only an agreement to assign. 2. That the plaintiffs were not in law entitled to maintain this action against the defendant, because of the want of privity between the defendant and the plaintiffs. 3. That the plaintiffs were not in law entitled to maintain this action because of the want of proof of any ascertained sum of money in the hands of the defendant, which could be said to belong exclusively to the plaintiffs. 4. That the plaintiffs' remedy, if any, was in a court of equity, where the rights of all parties concerned could be finally and satisfactorily adjusted. 5. That the plaintiffs in respect to the advance to Feehan were in the same position as other creditors of Feehan, and must with them share rateably under the deed of assignment to the defendant. The rule asked also to reduce the verdict to such sum as the court might find the plaintiffs entitled to, if any.

*Cameron*, Q. C., shewed cause during last term, and cited *Adderley v. Dixon*, 1 Sim. & St. 607; *Heath v. Hall*, 4 Taunt. 326; *Williams v. Everett*, 14 East, 582; *Poole v. Cowan*, 8 L. T. Rep. 385; *Wright v. Bell*, 5 Price, 325.

*R. A. Harrison*, contra, cited *Wharton v. Walker*, 4 B. & C. 163; *Wedlake v. Hurley*, 1 Cr. & J. 83; *Stephens v. Badcock*, 3 B. & Ad. 355; *Trower on Debtor and Creditor*, 182; *Jones v. Carter*, 8 Q. B. 134; *Great Northern R. W. Co. v. Shepherd*, 8 Ex. 30; *Bleaden v. Charles*, 7 Bing. 546; *Harvey v. Archbold*, 3 B. & C. 626; *Baron v. Husband*, 4 B. & Ad. 611.

BURNS, J.—In this case I have to read the judgment pre-

pared by the late Chief Justice of this court, in which I concur.

If the verdict for the plaintiffs should stand, I see there is some doubt suggested as to the correctness of the amount for which it was entered at the trial. This the parties can settle, and in case of any disagreement refer to the court.

I perceive that of the securities handed over by Feehan to the plaintiffs some have been endorsed by him, others (and far the greater part I think) not endorsed.

As to those endorsed by Feehan in blank, and delivered over by him in security to the plaintiffs, how can there be any question that the money collected on them should go to the plaintiffs, at least to the amount of their debt and interest?

As to those not endorsed, (all were negotiable,) the delivery of them over to the plaintiffs by Feehan, for the purpose of collecting them by the plaintiffs in Feehan's name, as they might be with his assent, would make the money collected upon them the money of the plaintiffs, as between them and Feehan, if Feehan had not made the assignment to defendant which he did make; and if so, then his assigning his debts afterwards to defendant can place the plaintiffs in no worse situation, when the defendant took them, or rather the assignment of them, with written notice that they had been placed in the plaintiffs' hands to secure the sum agreed upon.

It would have made the matter more clear if the securities had been all endorsed, as some were, though probably not for the purpose at the time of transferring them to the plaintiffs.

There may be a difficulty in adjusting the amount for which the verdict should be entered, for of course it is only on the moneys that can be held to have been paid by Thompson & Co. on account of the notes given into the plaintiffs' hands as security for their debt these plaintiffs can have any claim.

And as to those notes, the plaintiffs' right to recover seems to me to be clear, for they cannot be held to have passed under the assignment to defendant, except as to the surplus after the plaintiffs' claim. It was evidently the intent,

taking the assignment and the schedule together, to provide that the plaintiffs' advances should first be paid out of them, and to give the assignee to understand that there was that prior claim on the proceeds in the plaintiffs' favour, to secure which the plaintiffs held the notes.

I think Feehan's evidence fully supports the plaintiffs' right to the \$2,550, so far as it can be shewn to have been collected out of or on account of these securities.

If what was collected from Thompson & Co. was collected merely as so much by way of a dividend on their whole debt due, and without any reference to any particular securities, (as I suppose it was,) then of course a calculation must be made, founded on the proportion of the securities held by the plaintiffs to the whole of Feehan's claim against Thompson & Co.

I think there is nothing in the objections moved as grounds of nonsuit.

MCLEAN, J., having been absent during the argument, gave no judgment.

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### SLOMAN V. CHISHOLM.

#### *Slander.*

Plaintiff and defendant were tailors, the latter also selling dry goods. Plaintiff went into defendant's shop to buy cloth to make up a pair of trowsers for one A., who was with him, when defendant said to A., "Don't you have any thing to do with that man. That man will rob you: he is a rogue." He also asked A. to let him make the trowsers. The jury were directed that the words were actionable if spoken of the plaintiff in the way of his trade, and a verdict found for the plaintiff was held to be supported by the evidence.

THIS was an action for slander, tried before *Richards, J.*, at London.

The testimony was, that the plaintiff spoke of the defendant the defamatory words following: "Don't you have any thing to do with that man. That man will rob you: he is a rogue: you can see that by the way he was dealing with the clerk." It was shewn that the plaintiff, a tailor, and the witness who proved the speaking of the words, had gone

into defendant's shop together to buy some cloth for the witness to make a pair of trowsers : that the witness selected some cloth, and the plaintiff having \$5 of the witness' money for the purpose of paying for it, demanded from the clerk in the shop a discount on the amount of the purchase, which the clerk declined to give : that the plaintiff then went to the defendant, who was standing at a distance in the shop, and an altercation immediately took place between them. The plaintiff and the witness then left the shop, and as they were going out of the door the words charged against defendant as slanderous were spoken. The defendant, also a tailor, at the same time asked the witness to let him make up the trowsers.

At the close of the plaintiff's case *Wilson*, Q. C., objected that no special damage was laid or proved, and that the words were not actionable in themselves.

Leave was reserved to move to enter a verdict for defendant, and the learned judge directed the jury that if they thought the words were spoken of the plaintiff in the way of his trade as a tailor they might give damages. The jury gave ten cents.

*Read*, Q. C., obtained a rule *nisi* to enter a verdict for defendant pursuant to leave reserved. He cited *Hopwood v. Thorn*, 3 C. B. 293 ; *Burnett v. Allen*, 4 Jur. N. S. 488 ; *Hamilton v. Walters*, 4 O. S. 24 ; *Wilby v. Elston*, 8 C. B. 142.

*McMichael* shewed cause, and cited *Brown v. Smith*, 13 C. B. 596 ; *Huckle v. Reynolds*, 7 C. B. N. S. 114 ; *Homer v. Taunton*, 5 H. & N. 661.

McLEAN, C. J., delivered the judgment of the court.

The jury were no doubt right in their conclusion, for it appeared that the defendant, who also carried on the business of a tailor, had told the person who came into the shop to have nothing to do with the plaintiff, and asked him to let him make up a pair of pants for him or sell him a pair : that defendant would cheat him.

The verdict is quite in keeping with the suit, and its being

allowed to stand may have a salutary effect in teaching the defendant to put some restraint upon his language towards his fellow-tradesmen, and in teaching the plaintiff that it is not for every idle word spoken in passion that an action should be brought.

Rule discharged.

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IRWIN V. SAGER ET AL.

*Ejectment—Right to try question of boundary—Conflict of opinion.*

It was held by this court that at a former trial the question of boundary should have been tried in this action of ejectment. The Court of Common Pleas held differently upon the same point in other cases, and the Chief Justice of that court having at a second trial ruled in accordance with their judgment, a new trial was granted without costs.

EJECTMENT for the west half of lot No. 29 in the third concession of Ancaster.

This case came on for trial at the last spring assizes at Hamilton, before *Draper*, C. J., and the title of the plaintiff to the west half of lot 29, in the third concession of Ancaster, being admitted, the defendant offered evidence to prove that the land actually in dispute between him and the plaintiff, though claimed as part of that lot, was not in fact part of it, but part of lot No. 28, to which the defendant claimed title. The learned Chief Justice rejected that evidence, holding that under the statute he must treat the appearance as general, for the statute, though providing for a notice limiting the defence, the defence does not provide for a limited appearance; and consequently, as the general defence could not under the admission be sustained, the plaintiff was entitled to a verdict for the whole of the lot sued for; and that he must take possession at his peril of any land not belonging to that lot.

*Sadleir* obtained a rule *nisi* to set aside the verdict, relying upon the judgment given in this case after a former trial, 21 U. C. R. 373, at variance with the decision of the Common Pleas in *Lund v. Savage*, 12 C. P. 143, in accordance with which the learned Chief Justice ruled at the last trial.

*Barton* shewed cause.

MCLEAN, C. J.—The able judgment of the learned Chief Justice of this court delivered during the last term in this particular case seems to me conclusive as to the question whether or not a disputed boundary can be decided in an action of ejectment, or whether an action of trespass is the only form of action in which such a question can be raised. Before the passing of the Ejectment Act, Consol. Stats. U. C. ch. 27, the constant practice was to bring ejectment in any case of disputed boundary, and the premises were so defined that there could be with due care no difficulty in seeing on the face of the proceedings the premises sought to be recovered. It is true the verdict in any such action might be disputed at the instance of either party, and another action might be brought, but the facts disclosed in evidence were generally sufficient to satisfy the parties on which side the right lay; and though in some instances other actions might be brought on the same or different testimony, the disputed boundary might be called in question and disposed of, for the time at all events, in an action of ejectment as satisfactorily as in an action of trespass. I cannot, I confess, see that in changing the mode of proceeding in an action of ejectment, and causing the parties actually contesting to appear as plaintiff and defendant, instead of John Doe and Richard Roe, the legislature intended to drive a party, in order to assert a right to a piece of land in dispute, to an action of trespass in the first instance, in which damages only can be recovered, and then to an action of ejectment to recover the land after a recovery in trespass.

The 26th section of the Ejectment Act provides that upon a finding for the claimant judgment may be signed and execution issued for the recovery of possession of the property, or *of such part thereof* as the jury have found the claimant entitled to; and the 12th section provides that any person appearing to a writ may limit his defence to a part only of the property mentioned therein, describing *that part* with reasonable certainty in a notice entitled in the court and cause, and signed by him or his attorney; and an appearance without such notice confining the defence to a part shall be deemed an appearance to defend for the whole. I think

that these clauses, and the 49th section, as to the effect of a judgment in ejectment, and indeed all the provisions of the act, shew that, though the form of proceeding was changed, the action of ejectment was intended to be the same as it had always been. In the case of *Peters v. Nixon* (6 C. P. 451) the learned Chief Justice says that the practice of trying boundaries in actions of ejectment had prevailed too long perhaps to enable the courts by their own authority to put an end to it, but in that case the decision was to discourage (except when bound by well-established rule) the practice of trying questions of boundary by actions of ejectment, the legitimate object of which it declares is to try titles.

The decisions of this court as to the right to try questions of boundary in actions of ejectment, and those of the Common Pleas on the subject, are so much at variance as to leave suitors in doubt as to the law, and in some cases create so much inconvenience and expense to parties that it is extremely desirable that a decision of our highest court should be obtained; but till then I do not feel at liberty to decide that a course of proceeding which I believe has always prevailed in this province shall be no longer continued.

BURNS, J., concurred.

HAGARTY, J., dissented, retaining the opinion expressed by the Court of Common Pleas, of which he was then a member, in *Lund v. Savage* and *Lund v. Nesbitt*, 12 C. P. 143.

New trial without costs.

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IN THE MATTER OF THE ARBITRATION BETWEEN THE CORPORATION OF THE TOWN OF BARRIE AND THE NORTHERN RAILWAY COMPANY OF CANADA. .

*Award—Uncertainty—Motion to set aside.*

A dispute arose between the Northern Railway Company and the Corporation of the town of Barrie as to the construction of a branch line into the town, and it was agreed by both parties that a bill relating thereto, which was before the House of Parliament then in session, should be withdrawn, and all differences connected with the claim of the town against the Company be referred to the arbitration of one H. The arbitrator awarded that there was in 1853 a valid agreement by the Company with the town to construct this line, provided that suitable land should be procured by the town: that such land was so procured, but that the line had not been constructed; that the claim of the town to have such agreement performed still subsisted, "and if not performed their right to compensation in lieu thereof ought to be awarded." He then awarded as compensation for the non-performance of the said agreement, and in full satisfaction of the said claim, that the Company should pay to the Corporation, at a day and place named, £5,000, and that they should, when requested by the town, execute to them a conveyance in fee of all the lands mentioned in a certain indenture made by one B. to the Company; and should further, when so requested, execute a general release of all claims in respect of the land and right of way conveyed to them by the several parties over whose lands the said branch line was to pass. On motion to set aside this award for defects only apparent on the face,

*Held*, that it was not defective for uncertainty as to whether the agreement had been carried out, and whether the Company had an option to pay the £5,000 or construct the branch line, but sufficiently shewed that it had not been performed, and that no such option was intended: that the direction as to the conveyance and general release were authorised, and the latter not objectionable for omitting to state to whom it was to be made; and that as to the amount awarded, if, as contended, the Corporation could claim no damages beyond what they had expended in procuring the land, &c., it should be assumed that no more was given.

*Held*, also, that the inability of the Company under their charter to expend their funds in paying the award would be no ground for setting it aside.

*Galt*, Q. C., obtained a rule on defendants to shew cause why the award in this case should not be set aside on the following grounds:—

1. For uncertainty, in this, that the language of the award leaves it doubtful whether the arbitrator intended that the Company should have the option of carrying out the agreement entered into between the parties for constructing the branch line, (to lead from the station into Barrie,) or in default thereof to pay the £5,000 awarded.

2. That it is uncertain also in this, that the arbitrator does not find by this award whether the agreement has or has not been carried out, and leaves the right of the town to

claim the money to depend on the establishment of that fact.

3. On the ground that the arbitrator has exceeded his authority, in ordering a conveyance to be made by the Company to the Corporation, of certain lands formerly conveyed by one Boon to the Company.

4. And has exceeded his authority in directing the Company to execute a general release of all claims in respect of the land and right of way conveyed to them, or agreed to be conveyed to them, by the several parties over whose land the branch line from the main track to Barrie was to pass, and without directing to whom the release is to be made.

5. On the ground that the arbitrator has not stated what sum has been expended by the town in procuring land and water frontage for a turning, with right of way thereto, but has awarded generally that £5,000 be paid as compensation for non-performance of an agreement made to construct a branch line to Barrie, which it is submitted cannot be done, for that a municipal corporation cannot claim damages for the non-fulfilment of such an agreement without shewing damage to the Corporation, and that such damage must be taken in this award at the sum actually expended by them, which sum is not found by the arbitrator.

6. That the amount awarded is excessive.

The submission was in the first place provided for by a certain written agreement made between the parties in Quebec on the 16th of May, 1861, while a bill was before the Legislature, then in session, respecting the construction of the branch line into the town of Barrie, which bill it was agreed by both parties should be withdrawn on the signing of the said agreement. And they further agreed that the matters in dispute arising out of a claim of the Corporation of Barrie against the Company, in connection with the construction of a branch line into the town of Barrie, should be referred to arbitration, and that in such reference no appeal should be made to the act relating to the Northern Railway of Canada, passed in 1859, or to a certain order of the Governor-General in Council, of the 12th of May, 1859, or to the act in relation to the Northern Railway passed in

1860, so far as to prevent or relieve the said Company constituted by those acts from being bound by any obligations contracted by the Northern Railway Company of Canada with the Corporation of the town of Barrie before the passing of the said acts, but that the arbitration should proceed, be heard, and be determined, and an award made, as though the said acts had not been passed.

This preliminary agreement then provided that the Hon. S. B. Harrison, judge of the county court of the united counties of York and Peel, should be the arbitrator, and that his award should be final ; that proper bonds should be entered into by the parties ; and that the submission should be made a rule of court.

In pursuance of this agreement bonds were entered into by the respective parties, under their proper corporate seals, in which it was recited that disputes and differences had arisen between the parties, and were then pending, as stated in the agreement of the 16th of May, 1861, referred to, and that the said S. B. Harrison, Esquire, had been named the arbitrator by both parties for determining such differences ; and the condition of each bond was, that the obligors respectively should well and truly submit to, abide by, and perform the award of the said arbitrator touching and concerning the said matters in dispute between the Railway Company and the said Corporation, and so referred as aforesaid.

By his award made on the 31st of January, 1862, the arbitrator awarded :

1st. That there was in 1853 a valid and binding agreement by the Northern Railway Company with the Corporation of the town of Barrie to construct a branch line of railway from the main track in Innisfil into the town of Barrie, provided that suitable land and water frontage for a terminus, with right of way thereto from the said main track, was procured by the Corporation of Barrie free of cost to the Railway Company.

2ndly. That such suitable land and water frontage for a terminus, with right of way thereto from the said main track, was procured by the Corporation of the said town free of cost to the said Railway Company, and to their satisfac-

tion, at very considerable expense to the said Corporation of Barrie.

3rdly. That the said Railway Company did not, nor did the said Northern Railway Company of Canada, at any time since, construct the said branch line; and that the claim of the said Corporation of the town of Barrie to have the same constructed had never been abandoned or given up at any time, but on the contrary had been always since upon all convenient occasions urged and pressed for performance.

4thly. That reference being had to the agreement in the said memorandum of agreement, by which the award was to be made as though the several acts of Parliament therein referred to had not been passed, he awarded "that the said claim of the Corporation of the town of Barrie to have the said agreement performed was still subsisting, and if not performed their right to compensation in lieu thereof ought to be awarded:" and

5thly. As compensation for the non-performance of the said agreement, and in full satisfaction of the said claim of the said Corporation of the town of Barrie against the said Northern Railway Company of Canada in respect thereof, as by the said reference he was empowered to do, he thereby awarded, ordered, adjudged, and determined that the said Northern Railway Company of Canada, and their successors, shall and do well and truly pay, or cause to be paid, to the said Corporation of the town of Barrie, or their successors, on the 10th day of March next ensuing the date of the award, at the office of, &c., in Toronto, the sum of £5,000 of lawful money of Canada, and that the same be received by the said Corporation of the town of Barrie in full satisfaction and discharge of and for all the said matters in difference to him referred as aforesaid.

6thly. And he further awarded that the Northern Railway Company of Canada do, when requested so to do by the said Corporation of the town of Barrie, make and execute to them a valid deed of conveyance in fee of all lands and tenements mentioned and comprised in a certain indenture of bargain and sale made by one John Boon to the said

Company, dated the 18th of August, 1855; and should and do further, when so requested as aforesaid, make and execute a general release of all claims in respect of the land and right of way conveyed to them, or agreed to be conveyed to them by the several parties over whose lands the said branch line from the main track into the town of Barrie was to pass.

The award then gave directions as to the costs of the reference and award.

*Eccles, Q. C., and Angus Morrison*, during last term shewed cause.

*Cameron, Q. C., and Galt, Q. C.*, supported the rule.

BURNS, J., read the judgment prepared by the late Chief Justice of the court, in which he concurred.

As the reference was by way of compromise, and led to the withdrawing of a bill relating to the matter which was before the Legislature, neither party should be countenanced by the court in refusing to abide by the award on account of any objection not really applying to the merits of the matter in dispute. There is no complaint of any improper conduct on the part of the arbitrator; no affidavits are filed; and the defendants have confined themselves to exceptions which they contend shew the award to be invalid on the face of it. If these objections are well founded the defendants can have the advantage of them in resisting performance by whatever means it may be attempted to be enforced; and as the court has always a discretion in declining to set aside an award on application, is not this a case in which the party complaining only on such grounds as he contends are apparent on the face of the award should be left to oppose any remedy for enforcing payment?

But in regard to the objections, it seems to me there is nothing in the first, though the award happens to be so expressed as to leave some appearance of ground for it. We must give a reasonable construction to the award. The arbitrator has found that the Company have not yet done what they had agreed to do eight years before, though they

had been in no way absolved from doing it. The words "if not performed" may, when all is taken together, be understood to mean the same thing as "since it has not been performed." The arbitrator says in effect, "If the Company has not made the branch line they should make compensation: they have not made the branch line, and therefore I award," &c.

If the Company would rather make the branch line than pay the compensation they have it in their power to contend that an option is given to them, and to move to stay proceedings on the award till a certain day, to give them an opportunity to make the branch line. The court could then determine whether they had such an option.

But the arbitrator could have never intended to give an option. "If not performed," he says, "their right" (that is, the right of the town) "to compensation in lieu thereof ought to be awarded." "If not performed" may be reasonably taken to mean if they have *hitherto* not performed their undertaking, not if they shall not *hereafter* perform it, for he proceeds immediately to award "compensation for the non-performance of the agreement," thereby deciding that it had not been performed; and he awards that the compensation shall be paid at a certain fixed day little more than two months from the date of the award, and this without any reservation to the Company of a right to make the branch line instead of paying the money. What follows too respecting the Company conveying back the land is all consistent with the construction that the £5,000 was positively to be paid.

The third objection seems to be immaterial. It should be assumed that the arbitrator determined that the Company having refused to make the line, should not keep the land which had been conveyed to them in the confidence that they would make it. It does not appear on the face of the award why the land which Boon had conveyed to the Company should be made over by the Company to the town of Barrie instead of being re-conveyed to Boon, but all that can be said is that the facts which may have made that a just and reasonable direction are not set out in the award,

as they need not be. The circumstances may be such as to account satisfactorily for the award in this respect, and we should assume that there were good grounds for it, in the absence of information to the contrary. The town may have paid Boon for the ground, and directed him to convey it to the Company, and if so they should have it back again, since the Company have declined to make use of it for the purpose for which they got it.

It should be assumed that the arbitrator made allowance in his award for the town getting back this land, and thought it just to award the £5,000 after taking that into his consideration. Besides, if the direction respecting Boon's conveying this land to the Corporation of Barrie were on any ground void, the only consequence would be that they would lose the benefit of that direction in their favour. It could not interfere with their right to get the compensation awarded.

And so in respect to the fourth objection to that part of the award which directs that the Company shall execute a general release of all claims in respect of the land and right of way conveyed to them, or agreed to be conveyed to them, by the several parties over whose lands the branch line was to pass. So far as the town is concerned, that release was evidently intended to be something in addition to the pecuniary compensation. If from any defect in that part of the award the direction should fail of its intended effect, that would be no reason why they should not be paid the pecuniary compensation awarded. But is there in truth any difficulty as regards that part of the award?

It was a matter on which the arbitrator had a right to give the direction he did, if we suppose that his intention was, that besides paying the £5,000 the Company were to give up the land which they had not applied to the purpose intended. And as to the objection that it is not stated to whom the release is to be given, could not the Company release all right of action and claims against the Corporation of Barrie or any other person or persons whomsoever in respect of the land and right of way conveyed to them, or agreed to be conveyed to them, by the several parties over

whose lands the said branch line was to pass ? Besides, the release is only to be executed "upon request," which request would point out who it was that requested the release.

As to the sixth objection, it must be assumed that the arbitrator had good grounds on the evidence before him for making the estimate of damage which he did. The court has not the grounds before it and cannot go into the merits. If it were correct to assume that the arbitrator could give no damages beyond what the town had disbursed in acquiring land, then it ought to be assumed that he did so confine himself rather than that he did not.

The damages may be excessive, but that does not appear, and the case must be an outrageous one in that respect before any interference could be justified on such a ground.

It was argued that the Company could not consistently with their charter and the law of the land expend their funds in paying the damages awarded. If that be so it may follow that they cannot be compelled to obey the award, but this is no application to the Corporation for that purpose, but an application by the Company to set aside an award for a reason which, if it be a reason, must have existed at the time of the submission as well as now ; and after a compromise had been made, and the application to the Legislature withdrawn on the faith of the arbitration which was agreed to, it does not lie in the mouth of the Company to object to the award on the ground that no such compensation could be legally awarded. They cannot at least make it the ground of an active interposition at their instance.

The rule should be discharged with costs.

McLEAN, C. J., having been absent during the argument, gave no judgment.

Rule discharged with costs.

## COULSON V. GZOWSKI ET AL.

*Agreement—Construction.*

Plaintiff undertook to build for defendants all the bridges on a portion of the Grand Trunk Railway, and furnish the iron, “same to be shipped on board steamships from Great Britain to Montreal, the defendants paying the difference between freight and insurance by steamships and first-class sailing ships.” *Held*, that they were bound to pay such difference on all shipments, not merely on those made at a time when sailing vessels could be procured.

## SPECIAL CASE.

THIS was an action brought by the plaintiff against the defendants for recovery of the sum of £1,114, with interest thereon from the 4th of July, 1860, claimed under the following circumstances:—

The plaintiff, by articles of agreement annexed to and forming part of the case, contracted with the defendants to construct, build, and complete in every respect the iron girder bridge of St. Mary’s, Canada West, on the London and Grand Trunk Junction Railway, furnishing all materials and workmanship, and finishing according to plans and specifications; same to be completed and ready for use at latest in one month after the masonry on which same was placed should have been finished; and should by that period be sufficient to admit of the passage of trains. The said party of the first part to furnish the iron requisite, “same to be shipped on board steamships from Great Britain to Montreal, the defendants paying the difference between freight and insurance by steamships and first-class sailing ships.”

And it was further thereby agreed that the said plaintiff should construct and complete all the bridges on the Sarnia Extension of the Grand Trunk Railway of Canada on the same terms, price, and conditions.

The first shipment of iron was made by the plaintiff on the 23rd of September, 1857, the second on October the 19th, 1857, and again on the 5th of October, 1858; and it was admitted that on these three occasions first-class sailing vessels were not to be procured. The defendants now object to pay the difference of freight between steam vessels and first-class sailing vessels at these periods of the year, contending that the plaintiff, under the terms of the said con-

tract, is only entitled to be paid the said difference between freight by steamships and first-class sailing vessels at times when first-class sailing vessels offered a choice of mode of shipment. The plaintiff, on the other hand, contends that he is entitled to said difference of freight on all shipments made, whether sailing vessels could be had or not, the shipments by steamship being compulsory on him under the terms of the contract, and the shipments at that late season being in no way necessary for the due performance of the contract.

It is admitted that the girders for the London and Grand Trunk Junction Bridge at St. Mary's were completed and ready to be placed on the mason-work in the month of April, 1858, and that the mason-work was not ready to receive them until the 20th of August following, at which time the girders for the iron bridges on the Sarnia Extension were also ready, the plaintiff being all through ready considerably in advance of the time when the defendants' works were prepared to receive the bridges.

The question for the opinion of the court is, whether or not the plaintiff is under the terms of the contract entitled to be paid the difference between freight and insurance by steamship and first-class sailing vessels on all the shipments made by him in respect of said works, or only at times when first-class sailing vessels might be had, and the plaintiff might have chosen his mode of shipment but for the terms of the contract.

If the court shall be of opinion that the plaintiff is entitled to be paid the difference between freight and insurance by steamships and first-class sailing vessels on every shipment made by him in respect of said work, then judgment shall be entered up for the plaintiff for £1,114, with interest thereon from the 4th day of July, 1860, and costs of suit, to be paid forthwith. But if the court shall be of opinion that the plaintiff is not entitled to the difference of said freight and insurance at times when first-class sailing vessels did not offer, and the portion of iron then shipped must have been shipped by steam vessels if required for the due performance of the works, then the judgment shall be

entered for the plaintiff for the reduced sum of £679, with interest thereon from the said fourth day of July, 1860, with costs of suit to be paid forthwith.

*Hector Cameron*, and *E. T. Dartnell*, for plaintiff.  
*Anderson* for defendants.

The material parts of the agreement are sufficiently stated in the judgment.

MCLEAN, C. J., delivered the judgment of the court.

The contract leaves no option with the plaintiff as to the kind of vessel by which the iron was to be shipped. He had undertaken to build and complete in every respect the iron girder bridge of St. Mary's, Canada West, on the London and Grand Trunk Junction Railway, furnishing all materials and workmanship, and finishing according to plans and specifications, the same to be completed and ready for use at latest in one month after the masonry on which the same is placed shall have been finished, and shall by that period be sufficient to admit of the passage of trains. The said party of the first part to furnish the iron requisite, the same to be shipped on board of steamships from Great Britain to Montreal, the defendants paying the difference between freight and insurance by steamships and first-class sailing ships; and it was further thereby agreed that the said plaintiff should construct and complete all the bridges on the Sarnia Extension of the Grand Trunk Railway of Canada on the same terms, price, and conditions.

The defendants appear by the terms of the agreement to have been anxious to guard against any chance of delay in completing the bridges within a month after the mason-work being ready to receive the iron, and in order to avoid disappointments from the iron not arriving in time, stipulate by the fourth section of the agreement that the plaintiff shall buy all the iron requisite and consign the same to them, the defendants insuring it in their name against marine risk from the port of shipment to Toronto; and then by the eighth section it is provided that the iron is to be shipped on board of steamships from Great Britain to Montreal, the defendants

paying the difference between freight and insurance by steamships and first-class sailing ships.

There must have been some object in the defendants undertaking to pay the difference of freight and insurance between the different classes of ships: if their purposes would be equally well served by using first-class sailing vessels the higher rate of freight by steamship would scarcely have been undertaken. Whatever the object may have been, the plaintiff might be supposed to be aware of it and anxious to promote it, and his employment of steam vessels appears to have been to meet their particular desire. In September and October, 1857, few first-class vessels, if any, could be found to undertake a voyage to Montreal; and if the defendants contemplated that the mason-work of the several bridges would be ready to receive the girders early in the spring or summer of 1858, there was strong reason for them to have the iron during the fall of 1857, to have the girders ready whenever the mason-work was completed. A portion of the iron is said to have been shipped on the 5th of October, 1858, but there must be a mistake in that, because in the special case it is admitted that the girders for the London and Grand Trunk Junction Bridge at St. Mary's were ready to be placed on the mason-work in April, but that the mason-work was not ready to receive them till the 20th of August, 1858, at which time the girders for the iron bridges on the Sarnia Extension were all ready, the plaintiff being all through ready considerably in advance of the time when defendants' works were prepared to receive the bridges.

The iron might probably have been imported in the spring and summer of 1858, in time to prepare the girders before August, 1858, by first-class sailing vessels at a cheaper rate than in the fall of 1857 by steamships; but the plaintiff, as far as we can judge from the agreement, was expected to purchase and ship the iron to Montreal in steamships in the fall of 1857, and having done so in accordance with the terms of his contract, we think he is entitled to call upon the defendants to pay the difference of freight and insurance which it may have cost him.

Judgment for plaintiff.

## JONES V. TODD.

*Action for rent by assignee of reversion—Effect of mortgage by plaintiff—Eviction, proof of—Evidence of assignment of term to defendant.*

Action for rent due from March, 1855, by the plaintiff as assignee of the reversion against defendant as assignee of the term, the plaintiff's right to sue and defendant's liability being both disputed.

As to the plaintiff's right, it appeared that one Stanton being seised in fee mortgaged the premises to C. in 1830, and in 1845 conveyed, subject to this mortgage, to one J. H. C. in trust. C.'s executors, in 1849, assigned the mortgage to P., who in July, 1853, proceeded to foreclose, and under a decree in that suit the premises were sold to the plaintiff, who received a conveyance from all the parties interested. On the same day the plaintiff, having paid off the mortgage to C., mortgaged to J. H. C. to secure the balance of the purchase money payable in 1865, with a proviso that on payment the mortgage should be void. A discharge of this mortgage was recorded on the 2nd of September, 1861, the same day that this action was brought, and it was proved that two tenants who came in under March, the original lessee, paid rent to the plaintiff in 1857 and 1858.

As to defendant's liability, the plaintiff shewed that Stanton, in 1844, leased to one March for 21 years, who in August, 1853, assigned to one Phillpotts. To prove the assignment by Phillpotts to defendant who did not produce it upon notice, a memorial was produced from the registry office, executed by Phillpotts, of a mortgage of the premises by him to defendant in August, 1853, and a bill to foreclose this mortgage filed in 1859, with a decree for sale of the land made in 1860, were also proved, under which it was shown that defendant purchased the land.

For the defence it was shown that in February, 1857, the plaintiff filed a præcipe for summons in ejectment against March, on which a summons had issued, but the writ was not produced; and, further, that in March, 1855, J. H. C., by the plaintiff as his attorney, distrained for two years' rent up to that time. This action was for subsequent rent.

*Held*, 1. That but for the mortgage executed by the plaintiff to J. H. C., he would under the 32 H. VIII., ch. 34, be entitled to sue as assignee of the reversion for rent accrued after March, 1855.

2. That the discharge executed on the same day when action brought could not enable the plaintiff to treat the mortgage as if it had never existed, and that without proof that the mortgage had been satisfied before the rent sued for or some portion of it had accrued, the action could not be maintained; and *quære* as to the plaintiff's right even with such proof.
3. That the distress made by J. H. C., through the plaintiff or his attorney, shewed that he as mortgagee entered then, and that from that time he, and not the plaintiff, must be taken to have been entitled to the rent.
4. That defendant, being the assignee of March, could not dispute Stanton's right to make the demise in question.
5. That the deed of 27th July, 1853, shewed the plaintiff to be assignee of the reversion, for he took the fee by that deed, in which all parties interested joined in conveying to him.
6. That an eviction by the plaintiff for forfeiture, or an election by him to treat the lease to March as at an end, was not sufficiently shewn by the evidence as to the ejectment brought by him.

*Quære*, whether the assignment by Phillpotts to defendant was sufficiently proved by the memorial produced executed by the assignee, and the evidence as to proceedings in Chancery by defendant. Per *Burns, J.*, there was enough to go to the jury.

*Seemle*, that if assignee by way of mortgage defendant would be liable without entry.

THE declaration set forth that Robert Stanton, being

seised in fee of a certain parcel of land on the north side of King Street, in the city of Toronto, did, on the 29th of February, 1844, by indenture, demise the same to Charles March, his executors, administrators and assigns, to hold for 21 years from the 1st of March, 1844, at the yearly rent of £100, payable in quarterly payments, on the 1st of March, June, September, and December, in each year, free from all taxes, &c.: that March covenanted to pay to Stanton, his heirs and assigns, the said yearly rent, &c.: that March afterwards, on the 20th of February, 1844, entered into possession, and that during the term Stanton by deed granted all his reversion in the premises to the plaintiff: that during the term, namely, on the 1st of August, 1853, March, by indenture, in consideration of £500, assigned to G. A. Phillpotts all his unexpired term in the premises, to hold the same, and the said indenture of lease, and all the covenants contained in it, to him, his heirs, executors, administrators and assigns, for the residue of the term of 21 years: that after the making of the lease from Stanton to March, and of the indenture from March to Phillpotts, namely, on the 17th of August, 1853, all the estate and interest in the term of March and Phillpotts, by assignment thereof then legally made, came to, and vested in, and still remains in Todd, the defendant in this suit; whereupon the defendant became liable to pay to the plaintiff the yearly rent of £100, payable as aforesaid, and commencing on the 1st of September, 1853, amounting to £1,000, being the rent for a period during which the said term was vested in the defendant, which had not been paid either by March or Phillpotts, or by defendant, but remained wholly due to the plaintiff.

This action was brought on the 2nd of September, 1861.

The defendant pleaded :

1. Traversing the alleged grant by Stanton of his reversion to the plaintiff.
2. A plea traversing the alleged assignment of March's estate to the defendant.
3. That before the alleged breaches of covenant all the interest of March and those claiming under him became

liable to forfeiture, by reason of certain breaches of covenant on the part of March, and under the proviso in that behalf contained in his lease the plaintiff became entitled to re-enter, and in pursuance of such proviso the plaintiff did enter into possession, whereby all the estate and interest of March, and those claiming under him, then ceased and determined.

4. That during the term, and before the alleged breaches of covenant, the plaintiff wrongfully evicted March from the premises, and kept him out of possession from thence hitherto.

5. Payment in full of the rent claimed before action.

At the trial, at Toronto, before *Burns, J.*, it appeared that by indenture, dated the 29th of February, 1844, Robert Stanton demised to Charles March, his executors, administrators and assigns, the easterly quarter of lot number 4, on the north side of King Street, between Bay Street and Yonge Street, commencing at the south-east angle of the lot, and comprising 79 links of the lot along King Street westerly, by three chains and sixteen links in depth, to hold for 21 years, at the annual rent of £100, payable quarterly, as stated in the declaration, the tenant to pay all taxes. March, for himself, his executors, administrators and assigns, covenanted with Stanton, his heirs and assigns, that he, his executors, administrators and assigns, would pay the rent and taxes according to the lease, and would yield up the premises to the said Stanton, his heirs and assigns, in good repair at the expiration or other sooner determination of the term; provided, that if the rent should be at any time in arrear for thirty days after the day set for payment, or in case of breach or non-performance of any or either of the covenants thereinbefore contained, on the part of the said March, his executors, administrators and assigns, Stanton, his heirs and assigns, might re-enter upon the premises and re-possess the same as of his former estate, and might expel and remove the said March, his executors, administrators and assigns, and all tenants and occupiers of the premises. Stanton on his part covenanted that March, his executors, administrators and assigns,

paying the rent reserved and performing the covenants, should quietly enjoy during the term.

On the 27th of July, 1853, an indenture was executed between Alexander Patterson, of the first part, John Hillyard Cameron, of the second part, William Stanton, James Stanton, and Sophia Stanton, of the third part, Robert Stanton, of the fourth part, Charles Magrath, of the fifth part, and Edward Coursolles Jones, (the plaintiff,) of the sixth part, in which it was recited that Robert Stanton had by a deed, dated the 1st of June, 1830, mortgaged these premises to Hugh Carfrae, since deceased, to secure £600, payable to Hugh Carfrae, with interest: that Hugh Carfrae died in July, 1839, having by will, dated the 18th December, 1835, devised this and other lands to his executors upon certain trusts: that by indenture dated the 4th of May, 1849, between the executors then surviving, and the said Alexander Patterson, they assigned to him the said mortgage for £600, to hold to him, his heirs and assigns: that default was made in payment of the said £600 and interest, whereby the estate became absolute at law in the said Patterson: that by indenture dated in April, 1845, between Robert Stanton and John Hillyard Cameron, the said Robert Stanton conveyed all his estate in the mortgaged premises, subject to the mortgage, to the said J. H. Cameron, his heirs and assigns for ever, upon certain trusts, to receive the rents and profits of the premises and pay them over to certain persons mentioned in that deed: that by a decree of the Court of Chancery made on the 9th of September, 1851, in a foreclosure suit between Alexander Patterson as plaintiff and the said Robert Stanton, J. H. Cameron, and certain other persons, *cestuis que trust* in the deed made in April, 1845, as defendants, an account was ordered to be taken of the moneys due upon the mortgage, &c., and upon payment of the sum found to be due within six months Patterson should convey the mortgaged premises to J. H. Cameron upon the like trusts as set forth in the bill, but that in default of payment according to the decree the estate mortgaged should be sold under the direction of the master, &c.: that in pursuance of the decree, and of further orders

made in Chancery in the cause, the mortgaged premises were sold on the 27th of July, 1853, for £1,420, subject to the right of the Crown in respect of any claim thereon in consequence of the said Robert Stanton, the mortgagor, having held office under the Crown, and subject to any judgments outstanding against the said Robert Stanton, and subject to the said lease to Charles March: that the sale was made to Charles Magrath, who transferred his interest as purchaser to the said Edward Coursolles Jones, (the plaintiff in this suit :) that the said Jones had paid to Patterson all moneys due on the mortgage, with costs, which left a surplus of £637, 1s. 11d. out of the purchase money bid, which it was agreed should be secured by Jones by mortgage upon the premises to Cameron, as trustee, upon the same trusts as had been declared in the indenture of April, 1845. And by the indenture of six parts, dated 27th July, 1853, which contained the above recitals, Alexander Patterson, J. H. Cameron, and the several *cestuis que trust* in the deed of April, 1845, and the said Robert Stanton, joined in conveying to the plaintiff these premises, and all their respective interest, legal or equitable, of and in the same, to hold to him, his heirs and assigns for ever, subject to the same reservations as the premises were sold subject to under the decree in Chancery; and Robert Stanton covenanted with the plaintiff that he and the several parties of the first, second, and third parts, or some or one of them, were lawfully seised in fee simple, and had good right to convey, &c., and also for quiet enjoyment and further assurance.

On the same 27th of July, 1853, by indenture reciting the trust deed of April, 1845, and also the sale of the premises by order of the Court of Chancery to the plaintiff for £1,420, of which the plaintiff had paid down £750, and was to secure the remaining £670 by mortgage to J. H. Cameron as trustee, &c., the plaintiff mortgaged these premises to Cameron to secure the payment to him of the £670, or rather the balance after paying down £32, 18s. 1d., to be paid on the 1st of March, 1865, with interest in the meantime at six per cent. half yearly.

This was a mortgage in fee to J. H. Cameron. It con-

tained a covenant by the plaintiff for payment of the debt according to the mortgage, and a condition that from and immediately after such payment so made as aforesaid, and the observance, performance, and fulfilment of all and every of the provisoes, agreements, and stipulations in the proviso particularly set forth, the said indenture should be absolutely null and void to all intents and purposes whatsoever, as if the same had never been made. Covenants followed for title, that the premises were free from incumbrances, and for further assurance. The mortgage debt was to be paid on or before the 1st of January, 1865, and the interest half-yearly from the date of the mortgage; and from and after default in paying principal or interest the mortgagee might re-enter: until default the mortgagor or his assigns to have peaceable possession.

It was proved that by indenture dated 1st August, 1853, the lessee, Charles March, in consideration of £500, assigned his lease, and all his estate and interest in the land, to George Alexander Phillpotts, his executors, administrators and assigns.

It was further proved by the deputy registrar of the city of Toronto, that there was registered in the office a memorial signed by Phillpotts, of a mortgage executed on the 17th of August, 1853, by him to the defendant, Todd. Notice had been given to the defendant to produce the mortgage upon the trial, but he did not produce it.

Then there was produced a bill of foreclosure of that mortgage, filed in the Court of Chancery on the 27th of April, 1859, with a decree made on the 26th of October, 1860, ordering the land to be sold to satisfy the mortgage debt, under which order these premises were sold on the 14th of December, 1861, and the defendant in this suit, Todd, attended and bought the property at the sale, other property also being sold, but he bid for that now in question.

The defendant's counsel then took several legal exceptions as grounds of nonsuit, which the learned judge at the trial overruled, reserving leave to the defendant to move upon them in term.

The defendant thereupon proved that on the 5th of July,

1857, the present plaintiff, Jones, filed a *præcipe* in the Crown Office of the Court of Queen's Bench for a writ of summons in ejectment against Charles March, to recover possession of the premises, on which a summons had issued, but the summons itself was not produced.

It was proved that on the 21st of March, 1855, J. H. Cameron, by his attorney, E. C. Jones, (the present plaintiff,) issued a warrant of distress to a bailiff to levy upon Charles March, the tenant, £158, 6s. 8d., for rent from the 1st of August, 1853, to the 1st of March, 1855, alleged to be due to Cameron. The rent sued for in this action accrued subsequently to March, 1855.

The deputy-registrar proved that a discharge of the mortgage given by the plaintiff, Jones, to J. H. Cameron, was filed with the registrar on the 2nd of September, 1861.

One Mrs. Strang, it was proved, occupied a part of these premises as tenant to March, and it was sworn by her that the plaintiff, Jones, came to her, and told her not to pay rent to March, and she accordingly paid rent to Jones, on the 1st of June, 1858, £26, "being rent of the premises occupied by her on King Street for six months from that date," and on the 1st of December, 1858, Mrs. Strang paid to the wife of the plaintiff £26, "amount of rent of the premises occupied by her on King Street for one year in advance." Receipts for these payments were put in on the trial and admitted.

A witness named Flynn also proved that he occupied a portion of the premises at £40 a year, which he rented from Charles March in 1853, and held till May, 1860, and that from February 1857 till May 1860 he paid the rent to the plaintiff.

The facts, shortly to recapitulate them, are as follow:—

Stanton bought from H. Carfrae, in or before June, 1830, for on the 1st of June, 1830, he mortgaged to him to secure the purchase money, £600.

Hugh Carfrae died in July, 1839, seised as mortgagee in fee, having devised his lands to trustees, by will made in December, 1835.

On the 4th of May, 1849, Carfrae's executors assigned Stanton's mortgage for £600 to Patterson. But before this, namely, in April, 1845, Stanton conveyed to J. H. Cameron his remaining estate (equity of redemption) in the premises, (which he had before mortgaged to Carfrae,) on certain trusts in favour of his children.

In September, 1851, Patterson, the rent being in arrear, foreclosed and got a decree to sell.

On the 27th of July, 1853, the premises were sold under the decree to the plaintiff, Jones; and Patterson, Cameron, Robert Stanton, and the persons for whom Cameron held in trust, joined in a conveyance on the same day to the plaintiff, Jones, in pursuance of that sale, of all the interest held by them or any of them.

On the same 27th of July, 1853, the plaintiff, Jones, mortgaged his estate and interest in fee to J. H. Cameron, to secure the unpaid balance of the purchase money, for the benefit of the persons for whom he was trustee—the mortgage to be absolutely null and void immediately from and after payment of the debt.

On the 1st of August, 1853, Charles March assigned his term to G. A. Phillpotts.

On the 17th of August, 1853, G. A. Phillpotts mortgaged his interest in the term to the defendant Todd.

On the 27th of April, 1859, Todd filed a bill to foreclose this mortgage to him of the term. •

On the 26th of October, 1860, a decree for sale was obtained.

On the 14th of December, 1861, the property was sold under that decree, and Todd bought the premises now in question.

On the 2nd of September, 1861, the plaintiff, Jones, brought this action against Todd for rent due from the 1st of September, 1853, but not claiming at the trial for any rent accruing before March, 1855.

Upon the trial a verdict was rendered for the plaintiff for \$2,180.

*Galt*, Q. C., for the defendant, moved upon leave reserved at the trial for a nonsuit, upon the following grounds:—

1. For variance, it being alleged in the declaration that Stanton was seised in fee when he demised to March, whereas the deed produced by the plaintiff on the trial shews that he had then no legal estate in the premises.

2. On the ground that the deed to the plaintiff shews that the estate of the plaintiff was not a grant made by Stanton to him of Stanton's reversion in the premises, as alleged, but was an interest conveyed to the plaintiff by the owner of the estate, to whom Stanton had conveyed the same before the execution of the lease to March.

3. On the ground that it appeared on the trial that Stanton had only an equity of redemption in the demised premises, and was not seised in fee as alleged in the declaration, and therefore that the covenants in the lease are collateral to the land, and are not binding on the defendant.

4. Because it was shewn that before making the lease Stanton had conveyed all his estate in the premises to J. H. Cameron. (This ground however was abandoned, being unfounded in fact.)

5. That from the deed produced it appeared that the alleged reversion of Stanton never vested in the plaintiff, but became merged and extinguished.

Or that a new trial be granted without costs on the law and evidence, and for the reception of improper evidence, contending that the evidence shewed that the plaintiff had conveyed all his estate in the premises to J. H. Cameron, who had distrained for rent as landlord; also that the plaintiff had elected to treat the lease as void for breach of the conditions contained in it, and had on that account entered into possession, and evicted the tenant.

And for admission of improper evidence, namely, a memorial of an assignment of the premises in the declaration mentioned from Phillpotts, purporting to have been registered on the requisition of Phillpotts, but without shewing that the defendant was a party to the indenture; also, because the damages were excessive.

During last term *Cameron*, Q. C., and *Anderson* shewed cause, and cited *Gouldsworth v. Knights*, 11 M. & W. 337; *Sturgeon v. Wingfield*, 15 M. & W. 224; *Lynett v. Parkin-*

son, 1 C. P. 95; Webb v. Austin, 7 M. & G. 701; Doe dem. Whitaker v. Hales, 7 Bing. 322; Cooper v. Blandy, 1 Bing. N. C. 45; Cuthbertson v. Irving, 4 H. & N. 742, 5 Jur. N. S. 740; Doe dem. Marriott v. Edwards, 6 C. & P. 208.

*Galt*, Q. C., and *Adam Crooks*, contra, cited Jones v. Carter, 15 M. & W. 718; Earl of Portmore v. Bunn, 1 B. & C. 694; Doe dem. Viscount Downe v. Thompson, 9 Q. B. 1037; Burton on Real Property, 428; In re Williams' Estate, 5 DeG. & Sm. 515; Jones v. Davies, 29 L. J. Ex. 374; Upton v. Townsend, 17 C. B. 30; Lewin on Trusts, 14.

BURNS, J.—The late Chief Justice of this court, before whom this case was argued, has prepared a judgment, in which I concur, and which I am now about to read.

When Stanton made his lease to March, in February, 1844, for 21 years, the premises were under mortgage to Carfrae for £600. Stanton was mortgagor continuing in possession. Whether he was then in default or not, and under what terms he was in regard to possession till default, does not appear, for that mortgage was not produced; and it is of no consequence to consider what were the rights of Stanton and March under that lease respectively, for neither March nor his assigns could have disputed the right of Stanton to make the lease under which the tenant had entered and enjoyed, and there is not and cannot be any question now between any one holding under Carfrae's mortgage and the person claiming the rent under that lease, for that mortgage has been satisfied and is out of the way since the sale under the decree made in 1851, and the conveyance which followed it.

By these transactions the fee in these premises became vested in the plaintiff, Jones, who purchased subject to the term which had been granted to Charles March, which was then and is yet unexpired.

Then, independently of any question that may arise from the manner in which the term granted by Stanton to March has been dealt with, how would the plaintiff stand in regard to his right to sue as assignee upon the covenant for rent contained in March's lease?

Is it not right to hold that when the land was sold under the decree in Chancery to pay the mortgage debt, (the mortgage then being held by Patterson,) and when after such sale Stanton, Mr. Cameron, to whom he had conveyed on certain trusts (in 1845) after making the lease, and Patterson, the holder of the mortgage, all concurred in conveying the fee to the plaintiff as the real purchaser at such sale, the mortgage should be no longer regarded, and that Stanton should be looked upon as in possession of his former estate, unless so far as his deed in trust made to J. H. Cameron in 1845, after the lease, interfered with it, and that either from Stanton, or his trustee, or Patterson, or from all together, the estate passed—that is, passed by a conveyance in which Stanton, the lessor, joined—and that so the estate had by assignment become vested in the plaintiff, Jones?

See *Sherwood v. Oldknow*, (3 M. & S. 382, 394,) and at page 404, where *Bayley, J.*, says, “I agree that he (the plaintiff) is not an assignee of the tenant for life,” (who had made the lease,) “but he is an assignee of the estate, out of which the lease proceeded.”

This lease, made in 1844, proceeded out of Stanton’s estate of which he was then seised in fee, save only that he had mortgaged it before to Carfrae, but was allowed to remain in possession, and receive the rents and profits, which mortgage estate was afterwards put an end to by satisfaction of the mortgage money.

I do not think there is a difficulty in this part of the case, for that under the statute 32 H. VIII., ch. 34, the plaintiff, as assignee of the estate out of which the lease was made, may bring covenant for the rent, though at common law the assignee could not have brought covenant, though it ran with the land, but might have brought debt for the rent; though I cannot see at present how it can be held consistently that an action could not be brought by the holder of the estate for the rent on the covenant as running with the land. At common law, on an implied covenant as arising on the words “yielding and paying,” the owner of the estate demised at the time the rent accrued might have sued in covenant at common law, and why not on an express cove-

nant to pay the rent, as this is, for though the statute 32 H. VIII., does include covenants to pay the rent among those which it enables an assignee to bring, that should not compel the assignee to avail himself of the statute, and disable him to sue where he could before have sued at common law. See *Harper v. Burgh*, (2 Lev. 206;) *Vyvyan v. Arthur*, (1 B. & C. 410,) especially where the tenant covenants expressly with the lessor or his assigns.

An action will lie by an assignee of the reversion of part of the premises. *Twynam v. Pickard*, (2 B. & Al. 105,) *Shep. Touch.* 176.

Admitting that the plaintiff is entitled to sue as assignee, under the statute at all events, if not also at common law, for rent accrued while he held the reversion, then was he so situated as to be entitled to sue for the rent claimed?

It appears the rent sued for is that which accrued after the 1st of March, 1855. The plaintiff became seised of the reversion in July, 1853, and he mortgaged the premises immediately after, on the same day, to J. H. Cameron, in fee, for £670, of which mortgage a certificate of discharge was registered on the 2nd of September, 1861, the same day on which this action was brought.

No proof was given that the mortgage had been in fact satisfied at any time before that day, so for all that appears the plaintiff, while the rent was accruing, was not seised (in law) of the reversion. Can he then sue for the rent?

The mortgage made by the plaintiff to J. H. Cameron provides that from and immediately after the payment of the mortgage debt, and observance of all the conditions, the indenture shall be absolutely null and void to all intents and purposes, as if the same had never been made.

Then what is the effect of that on the plaintiff's right to sue for the rent on the covenant? Does it enable the court to look on the case as if the mortgage had no existence at any time, to put it as it were wholly out of consideration? If it does the plaintiff can sue, otherwise not, for while the mortgage was in force the mortgagee only could sue for the rent.

I think at present, that without proof that the mortgage was satisfied before the rent, or some portion of it, which is sued for, had accrued, the plaintiff cannot sustain this action, whatever might have been the case if the fact had been otherwise. (See the American Reports, *Wood v. Felton*, 9 Pick. 171 ; 1 Rawle, 355, which must be on some peculiar state of their law.)

No doubt the defendant could set up as a defence, that though Stanton had a right to make the lease, yet he or his assignee, the plaintiff, had divested himself of the estate before the rent accrued.

If the fact were shewn to be that the mortgage debt was paid before this action was brought, and that the rent since 1855 was still unpaid, *quære*, could not the mortgagor sue for it, since the right of the mortgagee to receive it was gone ? He might, perhaps, bring debt for it, being a sum due upon the land, but could he bring the covenant under the statute of H. VIII., not being assignee of the estate while this rent was running ?

Suppose there was not this objection by reason of the plaintiff having mortgaged, in 1853, to J. H. Cameron, and that he was in a situation to sue for the rent when this action was brought, then how is it as to his having a right to sue this defendant, Todd, who is assignee of the term ?

1. Todd, it is said, never enjoyed or entered. If so, I apprehend he cannot be liable for rent. See *Eaton v. Jacques*, (2 Douglas, 438,) and *Walker v. Reeves*, in note to same case, 463 ; American case, *Walton v. Cronly's Administrator*, 14 Wend. 63. See, however, *Westerdell v. Dale*, (7 T. R. 312.)

2. It is contended that the plaintiff had elected to enter for a forfeiture in the tenant not paying, and had brought ejectment. This seems not sufficiently made out.

3. That the plaintiff had entered into possession, and leased to others and received rent from them.

4. That it is not shewn that defendant is in fact assignee of the term, for nothing was shewn but a memorial signed by Phillpotts, the assignor, and it was not proved that Todd

was even a party to that deed. That may also be a fatal objection.

I think the fact that J. H. Cameron, through Jones acting for him, distrained for rent from August, 1853, to March, 1855, proved that he as mortgagee entered then; and from that time, if not before, Mr. Cameron must be considered to have been entitled to the rent, and not the plaintiff.

As to the objections on motion for nonsuit, the substance of the first issue is whether Stanton had a right to make a demise, which the defendant, as assignee of March, could not, I think, dispute.

As to the second objection, I think the deed of 27th July, 1853, proves this point in the plaintiff's favour. Stanton did convey to the plaintiff all his interest, and that includes the fee, Patterson joining in it, who held only a mortgage upon it, which mortgage was then satisfied, and Stanton had the estate relieved from the incumbrance.

The third objection seems to admit of the same answer.

The fourth objection seems not to be founded in fact.

The fifth I do not exactly understand.

Having read the above judgment, *Mr. Justice Burns* proceeded to say :

I have examined all the authorities cited, and considered the points raised as grounds of nonsuit in the first instance. With regard to the first objection, the tenant, March, and defendant, Todd, were not in a position to dispute the right of Stanton to make the demise. March certainly could not do so, for the term granted to him was relieved of the mortgage granted by Stanton to Carfrae previous to the lease to him, by payment of the mortgage debt under the decree of sale of the premises in Patterson's suit, and the defendant Todd comes in by assignment of March's interest, and of course could stand in no better position than March himself could.

Then as to the second objection, it appeared by the deed of the 27th of July, 1853, that the estate in fee in the premises was conveyed to the plaintiff by either Stanton, or Patterson, or Cameron, or all combined; and upon looking

at the facts it is apparent that the effect of the transactions up to that time was by payment of Carfrae's mortgage to enable Stanton to transfer the reversion by his act, with the acts and consent of the other parties, to the plaintiff.

As to the third objection, it seems to be answered by the foregoing answer to the former.

The fourth objection is not founded in fact, for Stanton did not convey to Cameron before he made his lease to March. The lease to March was in 1844, and the deed to Cameron in 1845. If the objection covers the point that it appeared by the deed of the 27th July, 1853, that Stanton had previously, by the deed of 1845, conveyed the premises to Cameron, the answer to that would be that the effect of the deed of 1853 is as stated in the answer to the first objection.

I do not clearly understand what is meant in the fifth objection by asserting that Stanton's reversion never vested in the plaintiff, but became merged and extinguished, for we think the effect of that conveyance was to transfer and vest the legal estate in the demised premises in the plaintiff, if not by the single act of one of the parties, then by the combined action of them all. Perhaps what was meant was but the renewal of the first objection in another shape; and if so, the answer to it is contained in what has already been said in answer to the other objections.

There does not appear, then, in any of the objections taken as ground of nonsuit any sufficient reason to nonsuit the plaintiff, and therefore all that part of the rule must be discharged.

We must then consider the grounds upon which the defendant has asked to have a new trial granted. The first of these is that the evidence produced shewed that all the estate of the plaintiff in the premises had been conveyed by him to J. H. Cameron, who had exercised the right of landlord and owner of the demised premises by having distrained for rent. I agree in the opinion of Sir John Robinson, that while the mortgage from the plaintiff to Cameron was outstanding and unsatisfied, the right to bring an action upon the covenant for the rent was vested in the mortgagee and not in the plaintiff. The very day on which this action

was brought, the mortgagee, it seems, gave a certificate under the statute of the mortgage having been satisfied, and no evidence was given that in fact it had been paid at any time. Now what is the effect of that certificate upon the rights of the parties? Is it to reinvest the plaintiff with his rights derived under the statute of H. VIII., to sue as assignee of the reversion, or might he bring debt for the rent as due and issuing from the land, being the party entitled to it after the mortgage is satisfied, and any further right in law of the assignee having a claim to the rent having ceased? These are questions we feel have not been sufficiently presented to the court either by the evidence or upon the argument. I take it that the evidence shewed that Cameron by the distress made in his name was acting upon his right as reversioner, and the rule of law is that when once an existing state of things be shewn, the presumption is that same state of things continues until something else be shewn inconsistent with it, in order to raise another presumption. In this case nothing has been shewn until we find the plaintiff giving notice to the under-tenants not to pay any more rent to March. Suppose that fact be looked upon as a resumption by the plaintiff of his taking the rents and profits as mortgagor in possession, still that did not take away or deprive Mr. Cameron of his right as reversioner of claiming the rents.

With respect to the second and third grounds stated for a new trial, under which it is argued that the defendant never entered or enjoined, and consequently cannot be liable for the rent, I shall not prejudge the case by any observations at present. I do not think any wrongful eviction by the plaintiff was properly shewn at the trial, and how far the defendant may be liable I consider as open to him to contend; and with respect to the plaintiff's right to sue, supposing him to be right in all other respects, I do not see that it can be said he has made an election to treat March's lease as at an end.

So far as treating the American cases as having a bearing upon the case, or being founded upon any peculiar state of their law, I copy this passage from a book recently published, Washburn on Real Property, vol. 1, page 340: "In con-

nection with the doctrine of assignment, it seems proper again to refer to the case of an assignment by lessee of his interest in the way of a mortgage, and how far such mortgagee thereby becomes liable as assignee upon the covenants running with the land. The English courts regard him as standing in the light of an assignee, and liable accordingly, though he may not have entered, and in this opinion the court of New Hampshire coincides, which is the more noticeable from the fact that it is held by the courts of that state that a man may become an assignee of a mortgage, with all legal rights as such, by a simple transfer of the mortgage debt by delivery without any writing. In the United States Court one of the judges in giving an opinion waived 'the much-controverted and variously-decided doctrine as to the responsibility of the mortgagee of leasehold property, but of which the mortgagee has never had possession, for the performance of covenants,' &c. The better opinion, as well as the weight of authority in this country, seems to be, that such mortgagee becomes responsible as assignee when he takes possession under his deed, but not before."

The case of *Williams v. Bosanquet*, (1 B. & B. 238,) would seem, perhaps, to settle the question so far as we are concerned in this country.

With regard to the fourth ground, I do not myself think that the objection amounted to anything more than a matter of argument to go to the jury. The question was whether Todd, the defendant, was assignee of Phillpotts. The defendant was required to produce the deed, and he declined to do so, and then it became necessary for the plaintiff to prove it by secondary evidence. Of course the production of a memorial signed by Phillpotts would not of itself have proved the fact; but in addition to that was proved the fact that the defendant, Todd, filed a bill in Chancery as plaintiff upon the assignment mentioned in that memorial to foreclose the mortgage. A decree was made in his favour, and upon that decree he attended the sale himself and bought the premises in question. Here was a chain of circumstances which, when combined, could leave no room in the

mind of any one to doubt the fact that the defendant claimed as assignee of Phillpotts, who was assignee of March.

Upon the whole, we feel that it is better that this case should undergo another trial, and therefore we make absolute the rule for a new trial, with costs to abide the event. And it would be well for both parties to consider whether they should not amend the pleadings on both sides, so as to present fairly the questions for adjudication.

McLEAN, C. J., having been absent during the argument, gave no judgment.

Rule absolute.

### MALLOCH V. MARTIN DERIVAN AND PATRICK DERIVAN.

*Ejectment—Defective conveyance by married woman—Statute of Limitations.*

**Ejectment.**—The land was granted to one Margaret McDonald, who with her husband executed a deed to one M. in 1831, but her name was not mentioned in it as a granting party, and there was no certificate of examination endorsed. The plaintiff claimed title through this deed, by a conveyance to him in 1860 from the heir at law of one J. R. ; and he held also a deed from the heir at law of the patentee executed in June, 1861. Defendants claimed through one W., who in 1845 purchased under an execution against J. R., and by possession.

It was proved that in 1834 J. R. went upon the land and lived there till his death in 1843. His widow and family soon afterwards went to Scotland, leaving one K. in charge, who in 1845 accepted a lease for five years from W., and at the expiration of the term was ejected by W.'s vendee, under whom defendants came in, and held until September, 1861, when this action was brought. The husband of the patentee died in May, 1841, and the jury found that she had then knowledge of some one being in possession. She lived until 1851.

**Held,** that defendants were entitled under the Statute of Limitations, for the conveyance executed by her passed nothing, and twenty years had elapsed since her husband's death, during which possession had been held by parties with whom the plaintiff had no privity.

**EJECTMENT** for lot 15 in the fourth concession of Nepean.

**Defence** for the whole.

The plaintiff claimed by purchase from Andrew Rollo, as heir of James Rollo, and also by purchase from Roderick McDonald, heir of Margaret McDonald, grantee of the Crown.

The defendant claimed through a deed from George Robert Burke, assignee of Archibald Wilson, a bankrupt, to Allan Gilmour, from whom defendant Patrick Derivan purchased; and also by long possession by Patrick Derivan and those through whom he claimed.

At the trial, at Ottawa, before *McLean*, J., it appeared that the Crown granted this lot in 1801 to Margaret McDonald, wife of Angus McDonald, and daughter of Donald Grant, a U. E. Loyalist.

On the 15th of January, 1831, Angus McDonald and Margaret McDonald his wife, the patentee, signed and sealed a deed of this lot to Trueman Minor. Angus McDonald had before that agreed to sell the lot to one Shields verbally, and Shields having sold to Minor, this deed, with Shields' consent, was made to Minor, who paid Angus McDonald for the land. But though Margaret McDonald signed and sealed the deed, with her husband, her name was nowhere contained in the deed as a granting party or in any way. The deed was between her husband alone and Minor, and was just such a deed as it should have been if the husband were sole owner of the land in his own right, and were unmarried. There was no certificate endorsed of an examination of the wife. The consideration expressed was £55.

On the 8th of March, 1834, Trueman Minor, by bargain and sale, conveyed the lot to John McNaughton for £100. And on the 28th of August, 1834, McNaughton, by deed of bargain and sale, conveyed the lot to James Rollo, late an officer in the 92nd Regiment, for £200.

On the 10th of March, 1860, Andrew Rollo, heir at law of James Rollo, who died in 1843, conveyed this lot and 100 acres of the next lot, the west half of lot 14 in the fourth concession of Nepean, to the plaintiff, for £542, 16s. 8d. This deed was a grant of all the grantor's right and interest.

On the 7th of June, 1861, Roderick McDonald, eldest son and heir at law of Margaret McDonald, the patentee, wife of Angus McDonald and daughter of Donald Grant, in consideration of £93, 10s., bargained and sold to the plaintiff the lot 15 in the fourth concession of Nepean, and released to him all his claim to the land.

On the defendant's part it was proved that on the 18th of February, 1837, one Archibald Wilson obtained a judgment in this court against James Rollo for £200 damages and £3, 10s. 2d. costs, upon which a *fi. fa.* against goods was issued and returned *nulla bona*, and afterwards a *fi. fa.* against

lands, returnable in Easter Term, 1838, on which Rollo's lands were seized, but by the assent of the plaintiff, Wilson, were not sold till 1845, under a writ of *ven. ex.* issued on the 9th of January, 1845.

This lot 15 was sold by the sheriff under that writ for £85 to Archibald Wilson, the judgment creditor, and conveyed by deed executed by Andrew Dickson, sheriff of the district of Bathurst, and dated 5th June, 1845.

Archibald Wilson having afterwards become bankrupt, his assignee, G. H. Burke, Esquire, on the 24th of January, 1848, sold this lot by public sale to Allan Gilmour, for £51, and conveyed it by deed dated 30th January, 1851.

It seemed from the evidence that there was probably a sale or a treaty about a sale from Mr. Gilmour to one of the defendants in this action, but there was no attempt to carry down the title further than to Gilmour.

It was proved that Margaret McDonald, the patentee, died in January, 1851. Her husband, Angus McDonald, had died on the 4th of May, 1841, nearly ten years before her. Roderick McDonald, their second son, was heir at law of Margaret, an elder brother having died before unmarried.

As to the possession of the lot, it was proved that one Allan occupied the lot: that in 1834 James Rollo took possession and improved the lot, and continued to live upon it till he died in 1843. His widow and the family not long afterwards left Canada and went to Scotland, leaving one Kelsoe in charge of the farm.

Archibald Wilson in August, 1845, prevailed upon Kelsoe to accept a lease of the lot from him for five years, at £5 a year, and at the expiration of the term Allan Gilmour, who bought from Wilson, the sheriff's vendee, brought an ejectment against Kelsoe and dispossessed him, and possession had been from that time to the present held by one of the defendants.

The verdict was entered on the record for the plaintiff, subject to the opinion of the court, but the defendants moved for and obtained a rule to shew cause why a verdict should not be entered in their favour on leave reserved at the trial, or why a new trial should not be granted on the law and

evidence; and the case was argued during last term upon that rule.

*M. C. Cameron*, for the plaintiff, cited *Doe Tiffany v. Miller*, 6 U. C. R. 459.

*Richards*, Q. C., contra, cited *Doe Carter v. Barnard*, 13 Q. B. 945; *McLaren et al. v. Morphy*, 19 U. C. R. 609; *Clerk v. Withers*, 6 Mod. 295; *Johnson v. McKenna*, 10 U. C. R. 520; *Doe dem. Shepherd v. Bayley*, Ib. 310; *Hill v. McKinnon*, 16 U. C. R. 216.

BURNS, J., read the judgment prepared by the late Chief Justice of the court, in which he concurred.

It is plain that James Rollo never had any legal title, for he bought from McNaughton, who bought from Minor, and the only pretence of title that Minor ever had was a deed from Angus McDonald of land which did not belong to him, but to his wife. If he had a life estate as tenant by the curtesy, and if his deed made in 1831, to which his wife was not a party, though she put her name and seal to it, but was never examined as to her consent to sell; if that deed could convey anything, which can hardly be contended, it would only be the life-interest of Angus McDonald, which ceased in 1841, at his death.

It is clear, then, that the plaintiff has no right to recover under his deed from the heir of James Rollo, because James Rollo never was seised of any legal estate in the land. If he had been then it might have become necessary to consider whether it had not become vested in Wilson under the sheriff's deed made in 1845.

But the title from Roderick, the son and heir at law of Margaret McDonald, the patentee, must be good unless it has been barred by the Statute of Limitations.

This action of ejectment was brought on the 5th of September, 1861.

The lot has been occupied continually from 1834, if not from 1833, until the present time, by James Rollo and persons claiming through him: that is, after Rollo's death to August, 1845, by Kelsoe, who was left, as he says, in charge when Mrs. Rollo went away, and since that the possession

must be looked upon as the possession of Wilson, from whom Kelsoe accepted a lease, till 1851, when Wilson's tenant was dispossessed by ejectment in the name of Gilmour, to whom Wilson's interest had been conveyed, and then these defendants came in (under Gilmour, as it would seem from the evidence) and have possessed since. So that there has been a continued possession under the chain of title beginning with Angus McDonald's invalid deed of his wife's land from 1833 or 1834 to the time this action was brought, September 5th, 1861, much more than twenty years.

But then the statute could not commence to run against the owner, Margaret McDonald, by reason of her coverture, till the 4th of May, 1841, when her husband died. There would even so, however, be twenty years between her right of action ceasing and the bringing this suit; and the jury found that Margaret McDonald knew when her right of action accrued—that is, on the 4th of May, 1841—that there was some one in possession of the land.

Then had not her heir been barred by the statute before he made the deed under which the plaintiff claims, and was not the plaintiff claiming through that deed barred before he brought this action in September, 1861?

Under the 1st, 2nd, 3rd, and 16th sections of the statute, ch. 88, Consol. Stats. U. C., the right of the plaintiff to recover upon a title derived through Margaret McDonald and her heir seems clearly to be barred, for twenty years and more before this action was brought there had been persons continually in possession who neither paid rent nor accounted for the profits to Margaret McDonald, nor to her heir, nor had acknowledged her title, but, on the contrary, were in possession under a deed executed by Margaret McDonald, which they claimed, though erroneously, and apparently supposed, had divested her of all interest in the land, the origin of their title being a pretended purchase of all her right.

The plaintiff cannot make a title under the Statute of Limitations—that is, cannot avail himself of the time that elapsed after the sale of the sheriff, made in 1845, under the *fi. fa.* against James Rollo—because those under whom

the plaintiff claims had no privity with the persons under that chain of title, but were claiming adversely to them. If the sale by the sheriff were legal, the heir of James Rollo had nothing to convey when he made his deed to the plaintiff.

If then the plaintiff cannot himself make out a title *in himself* under the Statute of Limitations, on account of there being no privity between him and those who had been in possession claiming through the sheriff's deed, that is, Wilson, Gilmour, and Derivan, and if he has not shewn a legal title under his conveyance from the heir of James Rollo because James Rollo had no title, nor under the heir of the patentee, because that title had become extinguished by the possession held under the deed made by Angus McDonald in 1831, it must follow that the defendants are entitled to a verdict.

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### SARFIELD V. SARFIELD.

#### *Dower—Satisfaction—Lease.*

Dower.—*Plea*, that demandant from the 2nd of November, 1858, had been tenant of the premises to defendant under a demise at the rent of £15 a-year, one-third of which she was to retain and still does retain for her dower, and the demandant accepted the same in lieu of her dower; and so the tenant averred that she assigned to demandant and demandant accepted her said dower.

To support this plea, the following instrument was put in, signed by the demandant only, not under seal: "I do hereby attorn to C. S. for (describing the land), and I agree to become her tenant therefor at the yearly rental of £15 a-year, with taxes, payable quarterly from this date, one-third of which I am to retain as my dower, and the remaining two-thirds to be paid to C. S. during her life. And in case a higher rent can be obtained for said premises, I agree to quit on receiving three months' notice previous to the end of any quarter."

*Held*, that the plea was not proved, for the instrument passed no interest in the land to demandant, and could not bar the right to dower or be treated as a satisfaction of it.

THIS was an action brought by demandant as widow of William Sarsfield, deceased, to recover her dower in broken lot No. 409, and the westerly part of broken lot No. 408, in the city of Kingston.

The tenant pleaded that the demandant for a long time, to wit, on the 2nd of November, 1858, and ever since, was and is tenant of the said premises to the said defendant, by

virtue of a certain demise theretofore made at and under a certain yearly rent of £15 per annum, payable quarterly, one-third of which said sum the said Jane Sarsfield was to retain and still does retain for her dower of and in the said premises in the declaration mentioned, and the said Jane Sarsfield accepted and retained the same in lieu of her dower in the premises aforesaid; and so the said Catharine Sarsfield avers that she assigned to the said Jane Sarsfield, and the said Jane Sarsfield accepted her said dower.

The case was entered for trial at the last assizes for the United Counties of Frontenac, Lennox and Addington, before *Richards, J.* Service of proper demand and all necessary papers was admitted. It was also admitted that the total value of the premises was £15 per annum. The tenant admitted a *prima facie* case on the part of the demandant. The tenant in proof of her plea proved the following instrument not under seal:—

I do hereby attorn to Catharine Sarsfield for broken lot 409, and the west part of 408, in the city of Kingston, with the buildings thereon erected, formerly owned by my late husband William Sarsfield, and I agree to become her tenant therefor at the rental of fifteen pounds a-year, with taxes, payable quarterly from this date, one-third of which I am to retain as my dower, and the remaining two-thirds to be paid to Catharine Sarsfield during her life, and then to the heirs of the said William Sarsfield. And in case a higher rent can be obtained for said premises, I agree to quit on receiving three months' notice previous to the end of any quarter.

*Kingston*, second day of November, 1858.

(Signed,)

Witness,

her  
JANE × SARSFIELD.  
mark.

JOHN CUNNINGHAM.

The tenant then called *George Sarsfield*, who gave evidence as follows: I am son of defendant: plaintiff has some portion of the back part of the premises: she has the back house and a little stable: she used the little paint-shop for a cook-shed: had a store: she has the back door of the house fenced off: I cannot say who nailed it up: she told

me not to break it down: she uses the well of water. I have seen her paying rent to mother: she paid it up to the second day of February last: she kept five pounds for her dower: she put up another house on some leased land: she kept the key up to eighth of August last, when we got it: she might have given it to Mr. Kirkpatrick on first of August: my mother has got the key of the front house: we could not get into the back premises: I was present when plaintiff paid defendant rent: I suppose she did pay a quarter's rent: I don't know of my mother offering the place to any one.

This closed the case for the tenant.

Agnew, on behalf of demandant, submitted that the instrument put in was void, for the following reasons: 1st. Not under seal. 2nd. Not signed by defendant, and not binding on him, and no consideration for the observance of it by the plaintiff. 3rd. It is pleaded as an assignment of dower, whilst it is only a temporary suspension of the right, if anything. 4th. Assignment of dower is transferring an interest in land, and must be under seal. 5th. Agreement not good for want of mutuality. 6th. Agreement is for the life of defendant, and ought to be under seal, and is intended to be for the life of the plaintiff.

He cited Roper on Husband and Wife, 400; Anderson, 287; Cro. Eliz. 482.

The learned judge suggested that a verdict should be taken for demandant, subject to the opinion of the court.

The following evidence was then given on behalf of the demandant:—

*Margaret Ferguson*, sworn.—I know the parties, I have lived with the plaintiff since her husband's death. In August, 1860, I saw plaintiff pay defendant rent: plaintiff gave defendant a written notice that she was not able to pay any more rent: defendant said she supposed she might look for another tenant: plaintiff said she might do so as quick as she liked, that she would leave the place as soon as she got the dower. She left the place in September and went to a house of her own she had built around the corner. I saw defendant in the house this summer, since she got the key,

with Mr. Robinson the cabinetmaker: she kept the key after this till the 4th of July, 1861, I took it then to Mr. Agnew's office and gave it to his clerk: she has some things in a shed, the boards are across the back door, nailed up.

*Cross-examined.*—She is not in possession of any part of the premises nor cook-house; this is on Colborne Street.

*Robert Woods.*—In August, 1860, I saw plaintiff pay defendant money. Plaintiff said, "I am not able to pay any more rent, and all I want out of the place is my dower." Then defendant said: "I suppose I may get a tenant as soon as possible." That was all I heard. She said she might as soon as she liked.

*W. A. Blatchford.*—I left a key with Mr. Kirkpatrick four or five months ago: I understood it was the key of these premises: I left it by direction of the plaintiff's attorney: I was told Mr. Kirkpatrick was defendant's attorney.

A verdict for demandant for five pounds was then taken, subject to the opinion of the court.

The question for the opinion of the court is, whether under the facts proved demandant is entitled to hold the verdict.

If the court shall be of opinion in the affirmative, then verdict for demandant to stand; but if of a contrary opinion, then the verdict is to be entered for the tenant, with costs.

The case was argued during last term.

*Read*, Q. C., for the demandant, cited *Park on Dower*, 121.

*Smith*, Q. C., contra, cited *Roper on Husband and Wife*, 392, 399; *Bright on Husband and Wife*, 366; *Com. L. & T.* p. 20, note; *Co. Lit.* 352; *Rex v. Stacey*, 1 T. R. 4.

BURNS, J., read the following judgment prepared by the late Chief Justice of the court, in which he concurred:—

There are so many mistakes in this statement of the case that it is difficult to make much of it. If the demandant meant to deny that the plea was a bar to the right of dower, she should have demurred to it. It is not clear what the parties thought they were contending about at the trial,

whether the right of dower alone, or that and claim to damages for detaining, or for damages alone.

But the verdict as taken is for the plaintiff, damages £5, subject to the opinion of the court, and I suppose the opinion desired is whether the demandant is entitled to judgment to recover her dower, and to damages also for detention of dower.

As to her right in this action to recover damages for detention of dower, it cannot be said that on this record she is entitled to any damages for detention, for there is no averment on the record that the demandant's husband died seised, and no intimation in the declaration that the demandant is suing for damages, nor any award of a venire to assess damages. Among the admissions made at the trial is one that the husband died seised, and defendant admits that demandant has a good *prima facie* right to dower in these premises, so there is no dispute about the marriage or seisin of the husband, or demand of dower as required by statute.

Then as to the tenant being the proper person to be sued, it is a matter of small value, and probably the parties are willing to waive all defects in the proceedings, and to settle without further difficulty after having their rights determined.

£15 was admitted to be the yearly value of the whole property, according to which the demandant had a title to £5 a year, and would, therefore, at the time she brought this action be entitled to the £5 the jury allowed her, (if properly demanded in the action,) provided she had been a year without recovering any equivalent, in the shape of rent withheld by her from the demandant or otherwise.

I do not see that it is plain on the evidence that she had been receiving nothing in this way for a year. According to some of the evidence the fact may have been so, but other parts of the testimony make that doubtful. There was clearly some time for which she received nothing, and it would not be worth while to open the case upon a question whether demandant shewed a strict right to £5, if she shewed herself entitled to anything.

Then as to demandant's right to judgment for the dower, there can be no question of that. There was no proof that the demandant had received anything in lieu of her right of dower, that is, in lieu of her life-interest.

If the tenant, Catharine Sarsfield, had leased the place to any third party during the life of the demandant, and it had been agreed between them that the demandant should receive the third part of such rent in lieu of dower, and if such rent had been in a formal binding manner assured to her, then such a compromise might have been set up in bar of her dower.

And so if the interest of Catharine had been such as enabled her to lease the premises to the demandant for life, and she had done so at a certain rent, and it had been in a binding manner agreed between them that the demandant should retain in her hands one-third of such rent in consideration of her continuing right of dower, that would have been an agreement the same in substance and effect as the other, and I have no doubt might have been set up as satisfaction in bar of her claim for dower; but this was no arrangement of that kind in fact, and is not so pleaded, and if the plea can be held to amount to that, then it is clear that the plea taken in that sense was not proved.

The agreement shown was not signed by the tenant Catharine. No interest therefore could pass under it to the demandant; and if she had put her name and seal to it, and if it had been by indenture between the two, still by the language of it it did not assure any certain term, but the demandant would have held only at the will of the tenant, Catharine, who could have turned her out at any time on a three months' notice.

While the demandant enjoyed the property on the terms mentioned in that paper, her claim for damages for detention of dower would be satisfied by her retaining one-third of the rent, and so far her right to damages would be affected; but it is impossible to treat this arrangement as any satisfaction of the right of dower, so as to prevent the widow recovering her dower after the relation of landlord and tenant had been put an end to. The parties then stood as they would have

done if no such transaction had ever taken place between them.

It cannot be maintained that by the paper put in evidence a lease for life had been granted by Catharine Sarsfield to the demandant, subject to be put an end to by a three months' notice; for so far from there being any instrument under seal assuring a life-interest, as there must have been according to our statute, (Consol. Stats. U. C., ch. 90, sec. 4,) there is nothing whatever in writing from Catharine Sarsfield, assuring an interest either for the life of herself or of the demandant.

Judgment of record should be entered for the demandant for her dower, but without damages.

Judgment for demandant.

## HURRELL ET AL. V. SIMPSON ET AL.

### *New trial—Practice.*

Where the defendant having a witness in court did not call him, relying upon the weakness of the plaintiffs' evidence and desiring to have the last word to the jury, the court refused to set aside a verdict for the plaintiffs, though dissatisfied with it.

TRESPASS.—First count, that defendants broke and entered certain lands of the plaintiffs, being the south half of the east half of lot No. 10, and part of the south-west quarter of lot No. 11, in the 7th concession of Cartwright, and for cutting down wheat.

Second count.—For wrongfully depriving the plaintiffs of certain goods.

*Pleas.*—1. Not guilty. 2. Avowry for rent in arrear, due from the plaintiffs to one Patrick Ogilvie.

This case was tried at the autumn assizes last year at Cobourg, before *Richards, J.*, and a verdict rendered for the plaintiffs, which verdict the court set aside and ordered a new trial. It was tried again at the last assizes held for Cobourg, before *Burns, J.*, and a verdict again rendered for the plaintiffs.

The facts of the case were these:—the plaintiffs had held a certain grist-mill and land from one Squair, as tenant to

him at a rental of £225 a year, which tenancy expired in October, 1860. A part of the premises had been mortgaged by Squair to Ogilvie, though when the mortgage deed was executed it was supposed the mill and all the premises were included in the mortgage. The mortgagee, Ogilvie, assumed the possession of the mill and all the premises in October, 1860, and the defendant Simpson, as Ogilvie's agent, through the defendant Loscombe, entered into a new arrangement with the plaintiffs, by which they took the whole for a year from October, 1860, at a rent of £150. In May, 1861, the defendant Simpson, as attorney for Ogilvie, signed a warrant to the defendant Coleman, as bailiff, to distrain on the plaintiffs' goods in the mill, and some wheat then growing upon the land, for a half-year's rent. At that time the plaintiffs had become aware that in fact the mill itself and mill-yard, and some of the land, were not embraced in Ogilvie's mortgage, and they paid to the bailiff, under protest, the sum of \$28 for rent of that part of the land covered by Ogilvie's mortgage. The bailiff, acting under the directions of the defendant Loscombe, sold the wheat seized in the mill and also the wheat then growing on the ground, for which act the plaintiffs brought this action against all the defendants.

At the first trial the plaintiffs contested the right of the defendants to distrain in respect of the property not covered by Ogilvie's title under the mortgage, which they were allowed to do. The verdict in the plaintiffs' favour was set aside.

At the last trial the plaintiffs' contest was that when the distress was made, in May, 1861, no rent was then due; that the taking in October, 1860, was for a year, and consequently there was in fact no rent due until the end of the year, namely in October, 1861.

The arrangement as to how the year's rent was to have been paid was made between the plaintiffs and the defendant Loscombe, but Loscombe being sued with the other defendants, no direct evidence was given at this last trial upon that point. The written lease between Squair and the plaintiffs was said to be in court, but neither side would use it for

any purpose, because each, if possible, desired the reply to the jury.

The receipt given to the plaintiffs for the \$28 paid to the bailiff was in these words :—

“Received of C. & W. Hurrell, before distress made, the sum of twenty-eight dollars twelve and a half cents for rent to apply on the twenty-five acres of land situate at the south-east quarter of the south half of lot number ten, in the seventh concession of the township of Cartwright. Dated Cartwright, May 9th, 1861.”

It was proved that the mill and mill-yard and some other land comprised no part of that twenty-five acres, and that of the twenty-five acres mentioned in the receipt some eleven or twelve acres was then in growing wheat. The plaintiffs paid the \$28 to the bailiff, alleging that that sum in their opinion would be a sufficient rent for the twenty-five acres, and they paid it under protest. It was not asserted, however, that it was paid under protest that no rent was then due, but it was pretty plain from the evidence that it was paid under protest that, as the plaintiffs did not consider Ogilvie's title covered the mill and other premises, there was no right to distrain at all.

The learned judge told the jury that the points for their consideration were two :—

1. Whether the plaintiffs entered into the premises under Mr. Ogilvie; and of that there could be no doubt, because the plaintiffs had surrendered the key of the mill to Ogilvie's agent, and received it back again from him, and went into possession at a rental of £150 for a year, and had paid some money as rent; and that the plaintiffs, as tenants, were not at liberty under the circumstances to dispute their holding under Ogilvie.

2. When the defendants distrained in May, 1861, was there then any rent due? The law was explained to them, that if nothing was said between the parties in October, 1860, when the plaintiffs took the premises for a year, the law would only imply that the rent was to be paid at the end of the year and not half-yearly; but then the jury would have to consider that when the bailiff called for the rent the plain-

tiffs paid on account \$28, and though paid under protest was it not protested against from another reason than that no rent was due, namely, because the plaintiffs contended the landlord could not distrain for want of his title covering all the premises? The jury were told that if any rent whatever was due they must find for the defendants.

The jury found for the plaintiffs and \$261 damages.

During last term *Hector Cameron* obtained a rule to shew cause why there should not be a new trial, on the ground that the verdict was perverse and against law and evidence, and the weight of evidence, in this, that the evidence shewed the rent for half a year to be due at the time of making the distress, and that the distress was lawful, and on grounds disclosed in affidavits filed.

The affidavits filed on the part of the defendants were as follows: Mr. Loscombe, the attorney, swore that when the plaintiffs took the premises it was agreed that the £150 for the year to be paid by the plaintiffs should be paid by equal portions, namely, £75 on the 13th of April, 1861, and £75 on the 13th of October, 1861: that he had seen the lease between Squair and the plaintiffs, and the only difference between that and the fresh holding was that the rent to Squair was to be paid half yearly in advance.

Mr. Loscombe's brother swore that after the first half-year's rent was due he called on the plaintiff, Charles Hurrell, for it, and his reply was that he could not pay it until some garnishment orders which had been served upon them were settled. The plaintiffs abandoned the premises after the distress, and had become insolvent.

*McBride* shewed cause, and filed an affidavit of Walter Hurrell, one of the plaintiffs, who contradicted Mr. Loscombe's affidavit about the terms of the holding, and he swore that there was no agreement or understanding that the rent should be paid half-yearly, but the rent was six hundred dollars for the year: that he was subpœnaed by the defendants to attend the trial, and though he did attend, yet the defendants did not call upon him. He said that Mr. Loscombe's brother was also subpœnaed to attend, and

did attend the trial, but he was not called upon to give evidence. He stated that the other plaintiff, Charles Hurrell, had moved away to another part of the country.

McLEAN, C. J.—It appears to me that the fact of the plaintiffs having on the two trials rested their ground of action on two distinct grounds—in the first on the want of title in Ogilvie to enable his agents to distrain, and in the second that no rent had actually accrued at the time the goods were distrained—affords a very strong presumption against the plaintiffs' action; and I confess that I have felt a strong inclination to grant a new trial on payment of costs, on account of the variance shewn at different times in that respect; but it appears on affidavit that Mr. W. Loscombe was present at the last trial, but not called as a witness, and according to his affidavit he could have proved a demand of the rent soon after the expiration of the first six months of the plaintiffs' tenancy, and then it was not denied that rent was due, but the only excuse for its non-payment was that some garnishee summons which had been served must first be settled. Mr. W. Loscombe's affidavit is produced by the defendants in support of the application for a new trial, but it is now too late. That evidence should have been given at the trial, and it might with the other testimony have been sufficient to prevent the necessity of any further application to the court on the subject. We cannot grant a new trial to enable the defendants to give evidence before another jury, which they were aware of, and might, if they had thought proper to call the witness, have given on the last trial.

BURNS, J.—I should upon the evidence have been better satisfied with a verdict for the defendants, but the question now is whether under all the circumstances we can interfere again. The jury must have seen from the tendency of my remarks that I was more favourable to adopt the view that in May, 1861, a half-year's rent of the premises had become due than otherwise. The defendants complain of no misdirection, nor indeed could they do so. On the trial they

combated the legal proposition upon which the plaintiffs alone rested their case, namely, that in the absence of anything to shew upon what terms the rent was to be payable, it would in law be payable at the end of the year, by relying upon the payment of the \$28 at the time when the bailiff went to distrain. The defendants had it in their power to shew at the trial what the terms were upon which the plaintiffs held from Squair, but they declined to shew that because they wanted to have the last word to the jury.

Then looking at the case through the medium of the affidavits, we find Mr. Loscombe's statement that it was agreed the rent should be paid half-yearly distinctly contradicted. The plaintiff, that is, one of them, was brought to the trial at the instance of the defendants, but they did not call on him to give evidence. Whether that may have arisen from a want of confidence in his truthfulness or not, we are not told. No reason of that kind, however, can apply to Mr. Loscombe's brother, so far as the defendants were concerned, I should think. If it be true, as he states in his affidavit, that he did, after the first half-year's rent became due, call upon Charles Hurrell for it, and received for answer that it could not then be paid because of some attaching orders having been obtained by third parties, it seems exceedingly strange that such evidence was not given by the defendants. That witness was at the trial and not called upon. If that statement were the truth there could be no question how the verdict should have been. What then was the reason it was not given? We are not told in any way. The whole case presents the appearance very much of the defendants relying on the weakness of the plaintiffs' evidence rather than upon the strength of their own. Very possibly an injustice may have been done by the verdict, but then parties are not to be at liberty to speculate upon what a jury may consider as to the weakness of evidence, when they themselves have evidence which might make the matter clear, and withhold it from the consideration of the jury. Persons who complain that a jury have not sufficiently weighed the effect of testimony before them, should at least shew that they themselves have kept back nothing from them, or give some

satisfactory reason for not offering the further evidence to the jury.

On the former case it is true the plaintiffs relied to maintain their action upon the fact that the mill and a portion of the land was not covered by the mortgage to Ogilvie; but when the court gave judgment in these defendants' favour upon that point no other question remained for consideration than the one of fact, namely, whether there was any rent due at the time of the distress being made, and it is manifest the defendants were aware of the necessity of establishing that fact.

It is impossible for the court to remedy an injustice, if injustice be done in this case, for it may be produced by the acts of the defendants themselves in not giving the evidence which might have been given.

I think the rule for a new trial should be discharged.

HAGARTY, J., concurred.

Rule discharged.

## FILLITER V. MOODIE.

### *Pleading—Duplicity—Practice.*

To an action for a false return to a *fi. fa.*, of goods on hand to the value of 1s., and *nulla bona* as to the residue, defendant by his first plea denied the return of goods on hand as well as the judgment alleged to have been recovered by the plaintiff. On demurrer to this plea, no one having appeared to support the demurrer, the court gave judgment for the plaintiff, but allowed defendant to amend on payment of 5s. costs.

THIS was an action for false return to a *fi. fa.* The declaration set out the judgment recovered by the plaintiff, and the placing the *fi. fa.* in defendant's hands as sheriff, and alleged that he took in execution goods of the value of the moneys directed to be levied, but falsely returned goods on hand to the value of 1s., for want of buyers, and *nulla bona* as to the residue.

The defendant by his first plea averred that he did not falsely return that he had seized goods to the value of 1s., which remained on his hands for want of buyers, nor did the plaintiff recover a judgment against the execution debtor, as in the declaration alleged.

To this plea the defendant demurred, on the ground that it was double: that no single issue could be taken upon it: that it denied only part of the return, saying nothing as to the balance of the debt due beyond 1s.: that the return must be taken altogether, and defendant could not by denying one part of it set up a defence to the breach assigned in the declaration.

*R. P. Jellett* for the defendant.

No one appeared to support the demurrer.

MCLEAN, C. J., delivered the judgment of the court.

When this demurrer was called for argument, the defendant's counsel admitted without hesitation that the plea was double, and liable to the objections taken to it, but contended that instead of demurring the plaintiff should have pursued a more summary and equally effective course, by applying to a Judge in Chambers to strike it out. The plaintiff was not bound to take that course, and was quite at liberty to demur as he has done; and if it were shewn that he had applied to the defendant's attorney to withdraw the plea and plead issuably at any time before the matter was brought forward for argument, he would have been entitled to costs, but he does not even appear, or any one for him, to support his demurrer. The judgment therefore is for the demurrer, with 5s. costs, and the defendant to have leave to amend on payment of that amount.

Judgment accordingly.

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During this term the following gentlemen were called to the bar:—WILLIAM FREELAND, FREDERICK JOHN DIGNAN SMITH, WILLIAM JOHN SIMCOE KERR, STAFFORD LIGHTBURN, JOHN PATERSON, THOMAS BABINGTON MCMAHON, FRANK EVANS, JAMES BETHUNE.

TRINITY TERM, 26 VICTORIA, 1862.

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*Present :*

The Hon. ARCHIBALD McLEAN, C. J.

„ ROBERT EASTON BURNS, J.

„ JOHN HAWKINS HAGARTY, J.

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AUSTIN V. THE CORPORATION OF THE COUNTY OF SIMCOE.

*Taxes.*

Where lands not assessable, no patent or license of occupation having issued for them, were improperly sold for taxes, *Held*, that the purchaser could not recover back the money in an action against the county. It did not appear in this case whether a conveyance had been executed to the plaintiff or not.

ASSUMPSIT on the common counts. 1st. For money paid by plaintiff for the defendants, at their request. 2nd. For money received by defendants for the use of the plaintiff. 3rd. Account stated, and interest thereon.

*Pleas.*—1st. Never indebted. 2nd. Payment.

At the trial, at Barrie, before *Draper*, C. J., it was proved, or rather admitted, that the plaintiff at a public sale of lands sold by the sheriff under a warrant from the treasurer of the county of Simcoe, issued for the collection of taxes in arrear or supposed to be in arrear on lands in the several townships in that county, purchased at such sale four lots of land in the township of Flos, and paid to the sheriff the amount of taxes claimed, together with the fees attending the sale, and that he received from the sheriff the usual receipt given to the purchaser at such sales, acknowledging the receipt of the purchase money, and promising at the expiration of the year to give a deed, should the lots not be redeemed.

It appeared further, by the testimony of Mr. Alexander, the agent for Crown lands in the county of Simcoe, that the lots purchased by the plaintiff at the sheriff's sale for taxes

had been sold by him in that capacity, and that one instalment had been paid upon each lot, for which he had given a receipt; that such receipt entitled the purchaser to a license of occupation executed by the Commissioner of Crown Lands in duplicate.

Mr. Alexander stated further that only one instalment had been paid on the land, and he was not aware that any license of occupation had been issued: that on former occasions licenses of occupation had been forwarded to him from the Crown Lands Office in duplicate, the one to be executed by the purchaser and returned when so executed, the other to be delivered to the purchaser, but that no license had been received by him for the purchaser of the lands in question, and that he was not aware that any such had ever issued: that a purchaser of land might apply personally or by agent at the Crown Lands Office, and obtain a license, but that the ordinary mode of proceeding had been that the license had been sent to him to be executed by the purchaser, shewing the terms of the purchase, and when the money became payable; and he thought that such a course would have been taken in this case had a license been prepared at the Crown Lands Office.

There was no other testimony at the trial to shew that a license of occupation might not have issued to the original purchaser, or that a patent might not in fact have issued.

*McMichael* moved for a nonsuit at the trial on various objections, but they were overruled for the time, and a verdict taken for the defendants, with leave to the plaintiff to move against it.

*Richards*, Q. C., obtained a rule pursuant to leave reserved, calling on the defendants to shew cause why the verdict entered for the defendants should not be set aside, and a verdict entered for the plaintiff for \$240, on the ground that on the facts appearing in evidence at the trial the plaintiff was entitled to recover, or why a new trial should not be had, or why a nonsuit should not be entered. He cited *Street v. The Corporation of Kent*, 11 C. P. 255; *Chitty on Contracts*, 5th ed. 559; *Buller N. P.* 131;

Birch v. Wright, 1 T. R. 387; Cripps v. Reade, 6 T. R. 606; Wright v. Colls, 8 C. B. 150; Doe McGill v. Langton, 9 U. C. R. 91.

*McMichael* shewed cause, and cited Addison on Contracts 196, 197, 207, 268.

McLEAN, C. J.—It appears clearly to me that the rule must be discharged in this case.

There was no contract whatever between the plaintiff and the defendants. The defendants in fact had nothing to do with the sale, and could not control it in any respect. The treasurer of the county is the person on whom the law throws the duty of collecting such taxes as are shewn to be in arrear by the collector's rolls received by him from the treasurers of the several townships, after all efforts have failed to collect in the townships, in consequence of the owner having been a non-resident or there being no distress on the land.

The treasurer can know nothing of the taxes due or the means of collecting them except from the vouchers which he receives, and he is bound to issue his warrant to the sheriff to collect the amount which appears to be in arrear. The sheriff then advertises the lands, distinguishing the lands which have been patented from those not patented or leased, and at the time appointed his duty is to offer the lands for sale to any persons who choose to purchase, but he makes no promise and can give no assurance that the titles of any of the lands are good. If he choose to do so he might perhaps be held personally responsible, but he could have no authority to bind any one else. The plaintiff attended the sale and became the purchaser of the lands in the township of Flos, for which no title whatever had ever been issued. In purchasing these lands the plaintiff was acting on his own judgment and at his own risk. He did not think proper before purchasing to enquire into the state of the title, and if he has failed in making a secure investment of his means he has no one to blame but himself.

His purchase was voluntary, his payment of money was voluntary, and the defendants cannot be held liable for money

voluntarily paid to the sheriff, and by him paid over to the treasurer of the county for the benefit of the township of Flos.

The cases recently decided in the Common Pleas, *Street v. The Corporation of Kent*, (11 C. P. 255,) and *Street v. The Corporation of Simcoe*, (12 C. P. 294,) are conclusive as to the right to recover back money voluntarily paid under precisely the same circumstances, and we must be guided by them, concurring as we do in the correctness of these decisions.

The sale of lands for taxes by a public officer, on whom the duty is thrown by law, stands on a footing entirely different from a sale between individuals on a contract. Where an individual offers land for sale the presumption is that he has a right to do so, and that the purchaser will receive a title for his purchase, but even in such a case, unless there has been fraud or a total failure of consideration, the money cannot be recovered from the vendor.

In this case there can be no doubt that the doctrine of "*caveat emptor*" must prevail, and that the defendants are not responsible for the moneys which the plaintiff has advanced without making the necessary enquiries as to titles.

BURNS, J.—I have had several consultations with my brother *Hagarty* respecting this case, and concur in the judgment which he is about to deliver.

HAGARTY, J.—This is an action for money had and received, and never indebted pleaded. The facts may be stated very shortly. For some years past, in the county of Simcoe and elsewhere, a general impression prevailed that land sold to parties at a government sale on credit, and one instalment paid, for which no patent or license of occupation had issued, were liable to pay taxes, and taxes were largely paid thereon, in most cases voluntarily, in some under protest. These lands were returned in the ordinary way to the county treasurer, and after being in arrear the time limited by law were exposed for sale by the sheriff under the usual warrant.

The plaintiff attended at one of these sales, purchased certain of the lands, paid his purchase money, and received the usual certificate from the sheriff.

He now brings this action to recover the money so paid, on the ground that nothing passed to him by his purchase, the lands bought not being legally liable for taxes, and of course not saleable by the sheriff.

After the decisions of the court of Common Pleas in the case of *Street v. The Corporation of Kent*, (11 C. P. 255,) and of *Street v. The present defendants*, (12 C. P. 285,) it is conceded by both parties herein that lands in the position above mentioned were not taxable.

The evidence in this case merely gives the above facts. No communication seems to have passed between the parties, no representation seems to have been made by either party to the other. The only inference to be drawn from the evidence is that the defendants, or perhaps I should say the various county officers having the carriage of the sales for taxes, in good faith believed the lands were really liable; and the plaintiff attended at the public sale, and, as we presume, believed they were so liable, and expecting to make a profitable investment of his money became the purchaser.

All we have now to determine is, if this money so paid and so received can be recovered back in this action.

The court of Common Pleas after full argument, in the case against these defendants, has expressly decided that if the money claimed by the defendants as due upon the lands for taxes had been voluntarily paid by the owners without protest, it cannot be recovered back.

This decision of a court of concurrent jurisdiction should, I think, be accepted by this court, until the Court of Appeal decide otherwise. I express no dissent whatever from this deliberate judgment, but accept it for the purposes of this suit.

In the case before us the facts are carried a step further. Conceding that the owner could not recover money voluntarily paid for taxes, we are asked to say that when the lands are professed to be sold for non-payment, the vendee can recover back the purchase money.

The plaintiff was under no pressure whatever. He voluntarily attended a public sale of various lands. No representation of any kind is made to him. The proceedings are all avowedly based on the construction of public statutes,

as accessible to him as to the defendants. No imputation whatever is made of concealment or bad faith, and he pays his money for a sale regularly made to him of a supposed right.

This court has already decided on full consideration, in the case of *Thomas v. Crooks*, (11 U. C. R. 579,) that when A. makes a deed to B. of certain property, merely covenanting against his own acts and defaults, and no fraud, concealment, or bad faith existing, and afterwards B. is ejected by title paramount, or finds that his deed really passed no interest, he still cannot recover back his purchase money paid.

Again, when it is once assumed as binding law that the owners of the land cannot recover money voluntarily paid by them for taxes, I am quite unable to understand how the purchaser who buys at a sale of a supposed interest from the sheriff can claim any superior equity. The consideration has equally failed in both cases; mistakes were equally made in both cases; and as to the retention of the money, it must be equally against good conscience to retain it in the one case as the other.

Neither at the trial nor on the discussion in term have the parties offered any evidence or urged any argument on a point usually occupying a very prominent position in such cases, namely, whether the dealing between vendor and vendee had been finally closed by deed of conveyance.

We may presume the plaintiff felt unable to found any additional claim on the possible absence of a deed of conveyance at the end of the year allowed for redemption. The sale in this case differs materially from the ordinary contract between individuals. The supposed owner is no party to it. It is a proceeding "*in invitum*" as to him, and under an Act of Parliament his supposed interest is sold by the sheriff. It only professes to sell the interest of the party. The money is paid down by the purchaser at once, and it is a part of the dealing that the ultimate conveyance cannot be made for a year, during which time the supposed owner can redeem, and the purchaser in such case gets back his money and ten per cent. thereon. If no redemption, then the certificate

given to the plaintiff as purchaser at the sale declares that after the limited time the sheriff will, on his demand, execute a conveyance of the interest sold. This certificate clothes the purchaser with certain intermediate rights. He may enter into possession and use the land, and may maintain actions against trespassers.

The evidence in this case discloses nothing as to any action that may have been taken by the plaintiff as holder of this certificate, nor of any possible communication that may have taken place after his obtaining it.

Had the owner of the land during the twelve months voluntarily redeemed and paid the arrears of ten per cent., I have no doubt but that the plaintiff could have recovered his money and such statutable percentage.

The sales for taxes of course rest altogether on the Assessment Acts. The nearest analogy is perhaps the sale of land by the sheriff under execution process. It is not very easy to find cases in point. *Peto v. Blades* (5 Taunt. 657) would warrant us in assuming that the only implied promise on a sheriff's sale (of goods) is that the officer does not know that he is destitute of title.

We know practically that sheriffs are continually advertising to sell "the interest" (whatever that may be) of execution defendants, and that sales have been made where the interest was either absolutely nothing, or so encumbered with prior claims as to be wholly worthless.

Whenever it becomes necessary to decide the point, it may probably be found that very much of the law which we find as to the rights of vendor and vendee when the former cannot show a good title is inapplicable to the case of sales under legal process, where no contract express or implied can be raised against the owner or supposed owner of the interest professed to be sold.

I have had occasion to consult a large number of authorities, nearly all bearing upon the rights of contracting parties where title turns out to be defective. I mention a few of them: *Spratt v. Jeffery*, 10 B. & C. 249; *Johnson v. Johnson*, 3 B. & P. 162; *Maynard v. Moseley*, 3 Swans. 655; *Kintrea v. Perston*, 1 H. & N. 357; *Hall v. Conder*,

2 C. B. N. S. 35; Hall v. Betty, 4 M. & G. 410; Early v. Garrett, 9 B. & C. 928; Ogilvie v. Foljambe, 3 Mer. 53; Cripps v. Reade, 6 T. R. 606; Morley v. Attenborough, 3 Ex. 500; Remfry v. Butler, E. B. & E. 887; Stray v. Russell, 5 Jur. N. S. 1295.

I think the verdict entered for the defendants should stand, or the plaintiff may, if he prefer it, have a nonsuit entered pursuant to the leave.

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IN THE MATTER OF POUSSETT AND THE CORPORATION OF  
THE COUNTY OF LAMBTON.

*Clerk of the Peace—Fees—Audit of his accounts.*

It is the duty of the magistrates in quarter sessions, not of the county auditors, to audit the accounts of the clerk of the peace before payment, and the treasurer should pay them upon the production of the chairman's order.

It was decided in *The Corporation of Lambton v. Poussett*, 21 U. C. R. 472, that the clerk of the peace is not to look to the government for the expenses payable by them under Consol. Stats. U. C., ch. 120, but to the county, who are to be reimbursed by the government.

Where the clerk applied to the county auditors instead of to the sessions, and they refused on the ground that he should be paid by the government in the first instance, both parties being wrong, the court discharged without costs a rule for a mandamus calling upon the county to pay.

*Christopher Robinson* obtained a rule *nisi* for a writ of *mandamus* to the corporation, commanding them to pay to the applicant, the clerk of the peace for the county, the charges mentioned and set forth in an account filed with the application, or so many of such charges, and such an amount therefor respectively, as the court might adjudge.

*Robert A. Harrison* shewed cause.

The statutes and authorities cited are referred to in the judgment.

BURNS, J., delivered the judgment of the court.

This application has been made in consequence of the corporation refusing to have paid to the clerk of the peace the fees due to his office for some eighteen months past, and it seems the principal ground of dispute between the corporation and the clerk of the peace is with respect to whom the clerk of the peace shall render his account of charges

relating to the administration of criminal justice, whether to the government or to the county. The corporation contends that under the Consol. Stats. U. C., ch. 120, no other charges than mentioned in the schedule to that act can be made by the clerk of the peace, and those it is contended should be rendered to the government. I really was under the belief that the case of *The Same Corporation v. Poussett*, (21 U. C. R. 472, 485,) had determined that question. Sir *John Robinson* uses this language: "In either case I think the intention and effect of the statute, ch. 120, is that the counties shall be paid or reimbursed by the government all such expenses as come within that statute, and have been audited by the proper auditors according to the regulations of the government, and not that the clerks of the peace, sheriffs, coroners, constables, and criers are to make out severally their accounts against the provincial government for such services. I do not, therefore, think that the clerk of the peace can be properly told that for charges relating to the administration of criminal justice he is to make out and present his accounts to the provincial government, and not to the county."

Inasmuch as the corporation does not seem to understand still its proper position with regard to these accounts, and seems to be contending against what all the older counties understand very well to be the law, it is necessary to give a short history of the municipal corporations, and as connected with the auditing and paying the accounts connected with the administration of criminal justice. It is only since the year 1852 that the county of Lambton has had a separate existence; and after its council was formed under the more recent of the Municipal Corporation Acts, it is perhaps the case that its municipal council sees things in a very different light than the older counties do. It is pretty evident that there is a disposition on the part of many of these corporations to assume a jurisdiction which does not belong to them.

In 1837, and previous to that year, the expenditure of the district funds rested with the justices in quarter sessions, and I am afraid there was but little control over the manner in which the same were expended. In that year the Legis-

lature passed the Act 7 W. IV., ch. 18, entitled "An act to regulate the expenditure of district funds within this province." The first section enacts that all accounts or demands shall be handed to the clerks of the peace on or before the first day of each session. The second section enacts that the accounts shall be taken up on the second day of each session, but shall not be passed or audited unless there be at least seven magistrates present. The third section is that the clerk of the peace shall furnish the treasurer with a list of the orders or cheques passed in each session according to priority of dates, and that it shall be the duty of the treasurer to pay the same accordingly. The fourth section enacts that no order which is passed or recorded shall be rescinded unless at least the same number who passed it be present; and the fifth section enacts that no order shall be made for the payment of any money, except it be for a debt actually due by the district, unless there be sufficient funds in the treasurer's hands to pay the same, and if any order be made contrary to these provisions, the magistrates who sanctioned the same shall be personally responsible to the person in whose favour the order was made.

The question upon this act is whether the same has been repealed or other provisions enacted, which has made it of no use either in whole or in part. That it has never been repealed is clear, for it remains in its integrity, and forms the 121st chapter of the Consolidated Acts of Upper Canada. How far it may be interfered with we must turn to the various acts respecting the municipal corporations. The first of these is the District Councils Act of 1841, 4 & 5 Vict., ch. 10. Under this act the power of appointing the treasurer was taken from the justices in sessions and vested in the Governor of this province. The 31st section of the act enacts that the new treasurer shall be under the control of and accountable to the district council, and the auditors thereof, touching all matters and things within the scope of the powers and jurisdiction of the district council, but shall with regard to all other matters and things be and remain under the control of and accountable to the justices of the peace for the district,

and to other authorities and parties, as the district treasurer appointed by the justices would have been if the act had not been passed. The 34th section gives the council authority to appoint auditors, and the 36th section prescribes their duties.

There can be no doubt, upon reading the whole scope of this first municipal act, that the intention of the Legislature was to transfer many of the matters which formerly the justices in sessions did over to the district council; but it is equally clear that, by expressly holding the treasurer accountable to the justices of the district, the justices' power over some of the money matters or the funds remained as formerly. There is nothing in the act relating to the administration of justice in any way. Nothing was more natural than to construe this act in conjunction with that of 7 W. IV., ch. 18, in this way, that the auditing and paying of all the accounts connected with the administration of justice remained with the justices in sessions. There is this material difference between the auditing and passing the accounts before the justices and those by the auditors of the district council, that no account connected with the administration of justice could be paid by the treasurer until the same was audited, and a cheque for the same signed by the chairman of the quarter sessions, whereas the accounts of the district council might be paid before being audited. The 32nd section of the municipal act very clearly contemplates that their accounts may thus be dealt with.

Then next in order came the statute of 1846, 9 Vict., ch. 58, for defraying the expenses of the administration of justice in criminal matters, now forming ch. 120 of the Consol. Stats. U. C. That act in its first section contains the provision that for the year 1846 one-third of the expenses shall be paid out of the Consolidated Revenue Fund, for the year 1847 two-thirds, and thereafter during each year the whole of the said expenses shall be paid out of the said fund. The Legislature never could have meant so absurd a proposition as that the different persons named in the schedule, from the clerk of the peace down to the crier of the court, should make out their accounts and claim one-third from the

government and two-thirds from the district, and then for 1847 *vice versa*. Besides, for the year 1846 many of such expenses must at the time of the passing of the act have been paid by the district. The only sensible and convenient construction to give to the act is and was that the different accounts should be paid as formerly, leaving the district to be reimbursed from the government.

Next come to be considered the acts of 1849, 12 Vict., chaps. 78, 80, 81, changing the districts into counties and remodelling the municipal act. The whole act 4 & 5 Vict., ch. 10, was repealed by ch. 80, and under ch. 81, sec. 171, power was given to the county council to appoint a treasurer. I do not find the duty of the treasurer defined in as specific terms as in the repealed act, but section 172 defines it thus: that it shall be the duty of such treasurer "to receive and safely keep all moneys belonging to the county, and to pay out the same to such persons and in such manner as he shall be directed to do by any lawful order of the municipal corporation thereof, or *by any law in force or to be in force in Upper Canada*, and strictly to conform to and obey any such law, or any by-law lawfully made by any such municipal corporation, and faithfully to perform all such duties as may be assigned to him by any such law or by-law."

Now it cannot be questioned that the 7 W. IV., ch. 18, was then in force, and the third section enacts as follows: "And it shall be the duty of the said district treasurer to pay the said orders, according to the respective dates and numbers in which the same were passed at the said sessions."

The 143rd section of ch. 81 gives the county council power to appoint auditors, but the 144th section, speaking of their duties, does so in very different terms from the former act. For though their duties are to examine, settle, and allow or report upon all accounts which may be chargeable upon or may concern the corporation, yet they are to do so for the whole year ending on the 31st of December of the year preceding their appointment, and to report thereon within a month after their appointment. It is very evident the Legislature never contemplated that every account of the clerk of the peace during the year was to be examined by

the county auditors, to be seen whether every paper filed by him, for which there was a charge of four pence, was correct, or that the clerk of the peace was to wait till after the end of the year, and when the audit took place, before he should be paid his account. The 7 W. IV., ch. 18, being still in force, the magistrates in sessions at each session would audit the accounts of the clerk of the peace, and he would receive his check upon the treasurer. Of course, at the proper time for auditing the accounts of the year the auditors might call upon the treasurer for his vouchers for payments made out of the county funds; and I suppose, if upon examination it were found that the magistrates had audited any illegal charges, notwithstanding the payment, the corporation could, perhaps, according to the decision of *The Corporation of the County of Haldimand v. Martin*, (19 U. C. R. 178,) recover such illegal charges back. The items of account, however, would not appear in the treasurer's office.

We find the duties of the treasurer defined still more tersely in ch. 54 of the Consol. Acts of U. C. than in the act of 1849, but yet in language comprehensive enough to see that the Legislature did not depart from the statute so often referred to, 7 W. IV., ch. 18. The 160th section of the Municipal Institutions Act, Consol. Stats. U. C., ch. 54, is as follows: "Every treasurer and chamberlain respectively shall receive and keep all moneys belonging to the corporation, and shall pay out the same to such persons and in such manner as the laws of the province, and the lawful by-laws or resolutions of the council direct." So long therefore as the statute 7 W. IV., ch. 18, remains a law of the province, the treasurer is bound by its provisions. The 168th and 169th sections of the Municipal Act provides for the duty of the auditors for the county, and that they are to examine and report upon the same after the close of the year.

We cannot make absolute the rule obtained in this case, for it seems Mr. Poussett has gone direct with his accounts to the county auditors, supposing the duty rested with them to settle the matter, and they have taken the ground in answer to his claim that he should send his accounts to

government, and that the county are only answerable to the clerk of the peace for such items of charge as are contained in the schedule attached to ch. 120 of the Consolidated Acts of U. C. According to our view of the law, the county auditors have nothing whatever to do with the accounts of the clerk of the peace in the first instance. When they audit the other accounts of the county after the end of the year, they may, perhaps, look at the accounts, if they can get them, to see whether there be any illegal charges. The treasurer's voucher for the payment, and what would appear in his office, would be the list of orders furnished every sessions by the clerk of the peace, and the orders or checks signed by the chairman of the quarter sessions.

We have not gone into the account of the charges made by the clerk of the peace, considering it premature to do that, and perhaps there may be no necessity for doing so. The magistrates in sessions should audit the accounts of the clerk of the peace, and he should be paid by the chairman's check on the treasurer, and under the fourth section of ch. 121 of the Consol. Acts U. C. it is made the duty of the treasurer to pay the same. We need do no more than say that it is the duty of the magistrates in the audit of the accounts to be governed by the tariff of 1845 for such charges as come under the items therein mentioned, and for others by the different statutes applicable. If any difference of opinion should arise between the clerk of the peace and the magistrates as to the meaning or proper construction of the tariff or act of Parliament, that would be a proper matter to settle by an application for a mandamus to the sessions.

The rule should be discharged, but as both parties have been wrong in this matter it should be discharged without costs.

Rule discharged, without costs.

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RYAN AND WIFE V. MILLER.

*Seduction—Evidence—Child born after marriage to a stranger—Presumption of legitimacy.*

The plaintiff's daughter was seduced by defendant, at whose house she was living, in May, 1860. In September she left him, and in October was married to one C. In February following a child was born. In an action for the seduction, the court having held that the child being born in wedlock its mother's evidence to prove it illegitimate was inadmissible; at a second trial the fact that defendant was the father of the child was attempted to be proved by his admissions, and the jury again found for the plaintiff.

*Held*, that the verdict was not supported by the admissions stated below; and *semble* that no evidence could be received to rebut the presumption of legitimacy. (See *Ryan and Wife v. Miller*, 21 U. C. R. 202.)

*Quære*, whether if a clear loss of service before the marriage had been shewn the plaintiff could recover for it.

THIS was an action brought against the defendant for the seduction of Catharine Hughes, the daughter of Sarah Ryan by a former husband deceased.

At a former trial the daughter was called as a witness, and proved that she lived in the house of the defendant for several months, and that she was there seduced by the defendant: that she continued to reside with him till within about a month of her marriage to one Corbett, and that she lived with her husband for a period of about four months before her child was born. On an application to set aside the verdict on the ground of the admission of improper evidence, the court held that Catharine Hughes, otherwise Catharine Corbett, could not be received as a witness to shew that her child born in wedlock was in fact illegitimate, and a new trial was ordered, but at the same time with strong expressions of doubt as to the suit being sustainable. (See the case reported 21 U. C. R. 202.)

The case was, however, brought down to trial a second time at Goderich, before *Draper*, C. J., and the only testimony offered was that of two witnesses, who spoke of certain conversations they had had with the defendant after the birth of the child, and after the marriage of Catharine Hughes to her present husband, Corbett. The first witness was a person of the name of Henry Mathers, who stated that after the last trial he conversed with the defendant, and made allu-

sions to the seduction, and said if it was true that he, the defendant, was very blameable, when the defendant replied, "I could not help it," or "How could I help it?" He also stated that Catharine Corbett and her reputed husband were living in the township of Wawanosh, where they passed for man and wife; that the defendant was a farmer, a married man, but without children, unless it were the child of Catharine Corbett, which was said to be his, but whether his or not the witness could not say.

The only other witness to support the plaintiff's case was one Robert Taggart, a brother of Sarah Ryan, who said that he was acquainted with Catharine Hughes, the reputed daughter of Mrs Ryan by a former husband, said to be dead: that the daughter had resided for several months, up to September, 1860, as a hired servant at defendant's, and that she had a child born in February, 1861: that on one occasion he went to serve a process on defendant, and advised him not to let the matter go into court: that defendant replied he did not care for the law: that he knew who was the father of the child, and had intended to do well for it, but as they had taken law proceedings against him he would do nothing: that he had put his property out of his hands to avoid the law, and they could get nothing from him—not so much as the pet lamb in the corner.

On cross-examination he stated that Catharine Hughes was then the reputed wife of William Corbett: that they were living at Wawanosh, mostly at the plaintiff's: that Corbett was there only a short time before the sitting of the court, and was there very recently, but that he was away during the last court.

For the defence a nonsuit was moved for—1st. On the ground that there was no evidence that Sarah Ryan was ever married to one Hughes, or that Catharine was her legitimate daughter.

2. No proof of seduction by defendant of Catharine, followed by pregnancy.

3. That the evidence shewed that Catharine had only one child, which was born after her marriage to Corbett.

4. That there was no proof of the time at which the child was born, and

5. That there was no direct proof that she ever had a child.

The learned Chief Justice decided that there was evidence that must be submitted to the jury.

The defendant then called the Rev. Alexander McKid, who proved the marriage by him, as clergyman of the Church of Scotland, of William Corbett, of Wawanosh, to Catharine Hughes of the same place, on the 11th of October, 1860.

Witnesses were called by the defendant to impeach the character of Robert Taggart, and amongst the number Henry Mathers, a witness for the plaintiff, was also called, who said he knew the reputation of Taggart for truth: that he was not reputed to be truthful, but quite the contrary; and that he would not like to depend upon his veracity in any case in which he (Mathers) was concerned.

The learned Chief Justice left the case to the jury, at the same time expressing great doubt whether he ought not to direct for the defendant. He told the jury that it was not enough to find that defendant had carnal intercourse with Catharine Hughes, unless followed by pregnancy: that by the evidence it appeared that she and Corbett were married four months and more before the child was born, and the presumption of law was in favour of legitimacy and not against it, and that upon grounds of morality and decency that presumption should have great weight.

Leave was reserved to the defendant to move for a nonsuit in case the verdict was rendered for the plaintiff.

The jury rendered a verdict for the plaintiff for \$40 damages.

*Robert A. Harrison* obtained a rule, pursuant to leave, to set aside the verdict and enter a nonsuit.

*Richards*, Q. C., shewed cause, and supported the verdict, on the ground that the admissions of the defendant were sufficient to sustain it. *Robert A. Harrison*, for the defendant, argued that there was no testimony to prove that the defendant was in fact the father of the child, and that

the utmost which could be inferred from the defendant's statements, supposing them to have been proved by credible testimony, was that the defendant had had carnal intercourse with the daughter of Catharine Ryan: that the daughter was married before the birth of the child, and that the child being legitimate, being born in wedlock, no presumption could be entertained from any conversation or admission proved that it was in fact illegitimate.

McLEAN, C. J.—It is evident from the observations made by the learned Chief Justice at the trial that he did not consider the action sustainable on the evidence produced in support of it, and I entirely concur in the view which he seems to have taken of it. The admissions certainly do not amount to any acknowledgment on the part of the defendant that the child was in fact his, though born after the marriage of the mother with Corbett. He may have had connection with Catharine Hughes, but the marriage of the mother so long before the birth of her child, and the fact of her being now living with her husband, or rather her being living with him at the time of the last trial, afford the strongest presumption that Corbett was in fact the father of the child.

The verdict is not supported by the evidence, and I think that it must be set aside and a nonsuit entered.

HAGARTY, J.—The daughter of the female plaintiff goes into service with defendant, and there has connexion with him in the month of May. She remains there till September, and then returns to her mother, and in the following month marries Corbett. A child is born in February following. No proof whatever is given of any loss of service by the mother from any sickness or inability caused by pregnancy.

It was rightly conceded in the argument that for anything that occurred after the marriage the present plaintiffs have no legal claim.

The strongest, if not the only way of putting the mother's claim, is that she has a right of action, if not under the statute, at least at common law, for her daughter's seduction before the marriage. It is not necessary to decide that if

she proved a clear loss of service from the defendant's connexion with her daughter while unmarried she could not recover, on the same footing as if she had been enticed away from her service as an ordinary servant or labourer. The evidence here shews nothing whatever to place her case in this, the only arguable position.

Illicit connexion, not followed by pregnancy or any disabling ailment, has never been held sufficient to maintain this action. The plaintiff's case cannot be put on more favourable grounds for her than if her daughter had died the day she married Corbett. On the evidence before us the action in such a case could not have been supported.

Another most serious difficulty arises. The case against defendant was rested on one or two loose expressions of his, from which the jury were asked to infer that he had connexion with the woman and was really the father of the child. Even had he distinctly admitted the connexion he could only have surmised the fact of paternity; and as the non-access of Corbett before marriage so far from being disproved may readily be assumed, the law cannot, I take it, infer anything against the child being the child of Corbett, born as it was in wedlock. On this point alone a nonsuit or verdict for the defendant might, I think, have been the proper result.

I think the plaintiff must fail. The action is one of a most revolting kind, wholly opposed to the merciful policy of the law, and deserves no encouragement from either court or jury.

As the learned Chief Justice suggests on his notes, the grandmother is seeking to prove what the daughter is wisely forbidden to do, to bastardise the issue born in wedlock. The husband, the only person entitled with any show of justice to complain, is not before us, and it is satisfactory to be able, on what seem to be clear legal grounds, to declare that an action like the present must fail to succeed.

BURNS, J., concurred.

Rule absolute.

## HOLCOMB ET AL. V. SHAW.

*Taxes—Collection of after return of collector's roll—Pleading—Consol. Stats. U. C., ch. 55, secs. 24, 96, 103, 104, 110, 111, 112.*

After the collector's roll for the year has been formally returned the municipality cannot appoint any one to collect the unpaid taxes by distress; their collection belongs to the treasurer.

In an action of replevin the defendant avowed, setting out the assessment of certain taxes in the city of Kingston for the years 1855 and 1859, the delivery of the collector's rolls to the collector for those years, and their return by him, with the taxes hereinafter mentioned appearing unpaid: that he, the defendant, was duly appointed by resolution of the council, instead of the collector for those years, to collect certain taxes remaining unpaid after the return of said rolls: that certain persons named were set down and assessed on the said rolls as owner and occupant of certain real property for a sum mentioned, payment of which was duly demanded by the collector of those years; and that at the said time when, &c., (being in 1861,) the defendant took the goods in question as a distress for such taxes, the same being in the plaintiffs' possession on the premises so assessed. *Held*, on demurrer, that the avowry shewed no defence, the council having under the circumstances no authority to make such appointment.

The plaintiffs in answer to the avowry pleaded several pleas, denying the assessment of the several parties as alleged, to which the defendant replied, so far as it might be intended to rely on any error in said assessments, that the collector's rolls for said years were made out by the clerk from the assessment rolls as finally passed, and the assessments in question correctly transcribed. *Held*, on demurrer, replication bad.

REPLEVIN, for an iron safe, office chairs and tables, &c., alleged to have been taken by the defendant on certain premises known as the Marine Railway Wharf and Stores, situate at the foot of Gore and Earl streets, in the City of Kingston. Writ issued on the 4th December, 1861.

*Avowry*, that in the year 1855 the assessed yearly value of the whole rateable real and personal property, in the municipality of the city of Kingston, after the final revision of the assessments for the said year, 1855, was £77,000, and in the said year, 1855, the mayor, aldermen, and commonalty (now the council of the corporation) of the city of Kingston, in council assembled, passed a by-law, sealed with the seal of the said municipal corporation, and signed by O. S. Gildersleeve, mayor, and head of the said corporation, who presided at the meeting of the said council at which the said by-law was passed, and by M. Flanagan, clerk of the said municipal corporation, authorising the raising of certain sums of money for the lawful purposes of the said municipality by the levying and collection in the said year, 1855,

of certain rates therefor, as follows, namely, &c., (specifying the sums required for different purposes and respective rates therefor,) and also in the said year, 1855, the mayor, aldermen, and commonalty (now the council of the corporation) of the said city of Kingston in council assembled, passed another by-law, sealed, &c., as before, and authorising the levying and collection in the said year, 1855, of a certain other rate of seven pence in the pound upon the said assessed yearly value to raise the sum estimated and required by the board of common school trustees of the said city of Kingston, in the said year, 1855, to be provided by the said mayor, aldermen, and commonalty of the city of Kingston, for the said year, 1855, the said several rates so authorised to be levied and collected in and for the said year, 1855, being together equal to 3s. 2d. in the pound, on the said assessed yearly value of £77,000.

And the defendant avers that in the year 1859 the assessed yearly value of the whole rateable real and personal property in the said municipality of the city of Kingston, after the final revision of the assessments for the said year 1859, was \$315,130, and in the said year, 1859, the mayor, aldermen, and commonalty (now the council of the corporation) of the said city of Kingston, in council assembled, passed a by-law, sealed, &c., and authorising the raising of certain sums of money for the lawful purposes of the said municipality by the levying and collection in the said year, 1859, of certain rates therefor, as follows, namely, &c., (specifying as before,) being together equal to nineteen and three-quarter cents in the dollar upon the said yearly assessed value of \$315,130.

And the defendant further avers that the clerk of the said municipality of the said city of Kingston, for the said years 1855 and 1859, made out collector's rolls, as required by the assessment laws in force in the said years in Upper Canada, for each ward in the said city in each of the said years for the collection of the said rates, in accordance with and founded upon the said several by-laws in that behalf, which rolls were duly delivered to the collector for the said respective years, and returned by said collector as required

by law, the taxes hereinafter mentioned appearing in the said rolls for the said years for Sydenham ward, in the said city of Kingston, on the return thereof as remaining unpaid: and the defendant further avers that at the said time when, &c., he was a collector duly and by a resolution in that behalf of the said council of the said municipality appointed by said council instead of the collector for the said respective years, to collect certain taxes remaining after the said return of said rolls unpaid, and amongst others the collector's rolls for Sydenham ward, for the said years 1855 and 1859, were delivered to the defendant, that he, the defendant, might collect the taxes remaining unpaid therein from the person or persons who ought to pay the same, which unpaid taxes in said rolls for said Sydenham ward for the said years 1855 and 1859, included and contained the taxes hereinafter mentioned; and the defendant avers that it became and was his duty, in virtue of his said appointment and office, to collect the taxes hereinafter mentioned of and from the person or persons who ought to pay the same. And the defendant avers that on the collector's roll for Sydenham ward aforesaid, in the said city of Kingston, for the said year 1855, Donald McIntosh and John Counter are set down and assessed as occupant and owner respectively, as, for, and in respect of certain real property situated in the said ward, being a part of the real property in the said ward known as the Marine Railway property, which was occupied by the said Donald McIntosh in the said year 1855, and therein assessed at the yearly value of £100; and the said several rates hereinbefore particularly mentioned as authorised to be levied and collected in the said year 1855, under the said by-law passed by the said council in that year, and contained and set down in the said rolls, amounting in all, as is hereinbefore stated and shewn, to three shillings and two pence in the pound, did on the said assessment of £100 yearly value come to and make the sum of £15, 16s. 8d., which was the tax for the said year 1855, rated, assessed, and set down on the said roll for the said ward to and against the said Donald McIntosh as occupant, and the said John Counter as owner, of the said part of the

aforesaid real property, known as the Marine Railway property, so occupied in the said year 1855, by the said Donald McIntosh as aforesaid.

And the defendant further avers that the said Donald McIntosh and John Counter, in the said year 1855, were both residents of and within the said municipality, and that they did not nor did either of them send children to, or support by subscribing thereto, any separate school for Protestants or coloured persons, within the said municipality in the said year, 1855, and that they did not, nor did either of them, on or before the first day of February, in the said year 1855, give to the clerk of the said municipality notice that they or he were or was Roman Catholics or a Roman Catholic, and supporters or a supporter of a Roman Catholic Separate School, within the said municipality.

And the defendant further avers that payment of the sum of £15, 16s. 8d. taxes, as aforesaid, so payable by the said assessed persons, or either of them, was duly demanded in the manner required and prescribed by law, by the collector of the said municipality for the said year, 1855; and the defendant further avers that at the said time when, &c., the said real property, in respect of which the said assessment was made to and against the said Donald McIntosh and John Counter, was occupied by the said plaintiffs, who were occupants thereof within the meaning of the assessment laws in force in Upper Canada, and who then had thereon and in their possession the said goods in the declaration mentioned; and the defendant says that the said sum of £15, 16s. 8d. taxes, as aforesaid, then still being unpaid, and fourteen days having elapsed from the time payment of the same had been duly demanded as aforesaid, without the same having been paid, he, the defendant, at the said time when, &c., and in the performance of his duty in that behalf, and justly, &c., took the said goods in the declaration mentioned, the same being then on the said premises in respect of which the said assessment was made and in the said plaintiffs' possession thereon, as he lawfully might, as and for and in the name of a distress for the said sum of £15, 16s. 8d. taxes aforesaid, so rated, assessed, and

imposed as aforesaid, and remaining due and unpaid at the said time when, as aforesaid, and so assessed and set down in the said roll, to and against the said Donald McIntosh and John Counter, as, for, and in respect of the said real property, as the occupant and owner of the same as aforesaid, in and for the said year 1855, as appears by the said roll. Wherefore the said defendant prays judgment, and a return of the said goods, with his damages, &c., according to the form of the statute in such case made and provided, to be adjudged to him.

The avowry contained a statement in the same terms as to the assessment for the year 1859, for part of said Marine Railway, against Hooker & Pridham as occupants, and Alexander Campbell as owner, and that the amount being unpaid, being \$138, 25c., the defendant seized the said property as a distress for the same. There was also set out in the avowry a distress made by the defendant for an amount of rates assessed in 1859, against R. M. Rose and Alexander Campbell, as occupant and owner of another part of the said Marine Railway property; and the return of the collector's roll by the collector of rates for 1859, the amount appearing unpaid thereon after demand made according to law by the collector for that year, were stated in the same manner in all respects as with respect to the assessment of 1855.

The plaintiffs pleaded eight pleas to the avowry, as follows:—

1. That the said clerk of the said municipality of the said city of Kingston for the said years 1855 and 1859, did not make out the collector's rolls, as required by the assessment laws in force in the said years in Upper Canada, for each ward in the said city in each of the said years, as in the said avowry of the defendant is alleged.

2. That the collectors for Sydenham ward for each of the said years 1855 and 1859 did not duly return the said collector's rolls for the said respective years, as required by law, as in said avowry is alleged.

3. That Donald McIntosh and John Counter were not set down and assessed on said collector's roll for Sydenham

ward, in said city of Kingston, for said year 1855, as occupant and owner respectively, for and in respect of certain real property described in said avowry, as is therein alleged.

4. That the sum of £15, 16s. 8d., mentioned in said avowry of the defendant as the tax for the said year 1855, for the said premises, was not rated, assessed, and set down to and against the said Donald McIntosh as occupant, and the said John Counter as owner of the same, as in the said avowry is alleged.

5. That in the collector's roll for Sydenham ward for the said year 1859, Hooker & Pridham and Alexander Campbell are not set down and assessed as occupants and owners respectively for and in respect of certain real property in said avowry described, as is therein alleged.

6. That the sum of \$138, 25c. mentioned in the said avowry as the tax for the said year 1859 for the said premises was not rated, set down, and assessed in said last-mentioned collector's roll, to and against the said Hooker & Pridham as occupants, and the said Alexander Campbell as owner of the said land, as in the said avowry is alleged.

7. That on the collector's roll for Sydenham ward for the said year 1859, R. M. Rose and Alexander Campbell are not set down and assessed as occupant and owner respectively as and for certain real property in the third part or count of the said avowry mentioned, as is therein alleged.

8. That the sum of \$59, 25c., mentioned in the said part or count of the said avowry as the tax for the said year 1859 for the said premises, was not rated, assessed, and set down in said last-mentioned collector's roll, to and against the said R. M. Rose as occupant, and the said Alexander Campbell as owner, of the said land, as in the said avowry is alleged.

They then demurred to the three parts or counts of the avowry as bad in substance, on the ground that the circumstances mentioned do not afford a justification in law for taking the plaintiffs' goods in the year 1861, by way of distress for taxes assessed in 1855 against Donald McIntosh and John Counter (or in 1859 against Hooker & Pridham, and Alexander Campbell, or against R. M. Rose and Alex-

ander Campbell) inasmuch as the remedy for the recovery of taxes by distress of goods is only given by law against the persons who have been assessed for such taxes, and from whom the same have been demanded, and not against future owners or occupants; and it appears from the avowry that Donald McIntosh and John Counter, and not the plaintiffs, were the parties assessed for 1855 for said taxes, (and Hooker & Pridham, and Alexander Campbell, and R. M. Rose and Alexander Campbell, for 1859,) and from whom the payment thereof was demanded.

That the remedy by distress for taxes did not at the time when, &c., exist against any person whatever, because it does not appear that the collector for the years 1855 or 1859 did, on or before the 14th of December, in either of these years, return his roll to the city chamberlain, nor that any resolution was passed by the council of the city of Kingston appointing any other later day for the return of such roll to the city chamberlain, and because pending such return the city council had no power to appoint a person instead of the collector to collect the unpaid taxes by distress; and because, if any such person could ever have been appointed by resolution, it should have been immediately after the day fixed for the return of the collector's roll for each of the said years, and not after the lapse of several years.

A further objection was urged to that part of the avowry relating to the rates for 1855, assessed against McIntosh as occupant, and John Counter as owner, that it does not appear by the avowry that the word "owner" was added to the name of John Counter or Donald McIntosh on the assessment roll, or the word "occupant" to either name, and that therefore the taxes for 1855 cannot by law be recovered in any way from those who have since that year owned or occupied such property; and a similar objection was taken to the other parts of the avowry.

The defendant replied to the first, third, fourth, fifth, sixth, seventh, and eighth pleas to the avowry, so far as it may be intended to rely under the same, or one, or either of them, upon any supposed defect or error committed in or with regard to the said assessments in the rolls, or so far as any

such defect or error may be objected against the validity of any of said assessments, that the collector's rolls for Sydenham ward, for the said years 1855 and 1859, in the introductory part to and in the avowries mentioned, were made out by the said clerk from the assessment rolls for said ward for the years 1855 and 1859, as finally passed by the respective courts of revision for the said city of Kingston, for the said years respectively, and amended by the judge of the county court of the united counties aforesaid on appeal, and certified by the said clerk, and the said assessments mentioned in said avowries are correctly transcribed from the said assessment rolls, as contained therein, into the collector's rolls as aforesaid.

The plaintiffs demurred to this replication, on the grounds,

1st. That the said replication seeks to raise an immaterial issue.

2nd. That it is a departure from the defendant's avowry, in this, that it admits the truth of the pleas, which are direct traverses of allegations contained in the defendant's avowry.

3rd. That the mere fact that the collector's roll is correctly transcribed from the assessment roll is of no avail where both rolls are equally defective.

*Albert Prince and Kirkpatrick* for the plaintiffs.

*Read*, Q. C., and *Agnew*, contra, cited *Jarvis v. Brooke*, 11 U. C. R. 299; *Newberry v. Stephens et al.*, 16 U. C. R. 65; *McBride v. Gardham*, 8 C. P. 296; *Spry v. McKenzie*, 18 U. C. R. 161; *Fraser v. Page*, *Ib.* 327; *McLean v. Farrell*, 21 U. C. R. 441.

[Hagarty, J., referred to *Sargant v. The City of Toronto*, 12 C. P. 185, not then reported.]

Consol. Stats. U. C., ch. 55, secs. 9, 19, 21, 22, 23, 24, 26, 61, 93, 96, 97, 99, 102, 104, 110, 111, 112, were referred to in the argument.

MCLEAN, C. J.—The defendant shews by his avowry that certain rates were assessed in 1855 against Donald McIntosh and John Counter, and in 1859 against Hooker &

Pridham, as occupants, and Alexander Campbell as owner of part of the Marine Railway premises, and R. M. Rose as occupant, and Alex. Campbell as owner of another part of the same premises, and he alleges that the collector's rolls containing the assessment against these several parties for the years mentioned were duly returned, and that on such rolls the amount assessed against the parties respectively appeared to be due and unpaid:—that being so due and unpaid he was appointed collector, and the rolls shewing the same to be due were placed in his hands to enable him to collect such arrears from the *person or persons who ought to pay the same*:—that the same having been demanded from the parties whose names appeared on the collector's roll, and the same remaining *fourteen days unpaid* after such demand *by the collectors for 1855 and 1859*, and the plaintiffs *being in possession* of the premises for which the rates were due, and the goods being on the premises, the defendant seized them by way of distress for such rates.

The 94th section of the act for the assessment of property, Consol. Stats. U. C., ch. 55, requires that a collector shall call at least once on the person taxed, or at his place of residence or place of business, if within the municipality, and shall demand payment of the taxes payable by such person. Then the 96th section provides that if payment be not made the collector may, after the lapse of fourteen days after such demand, levy the same, with costs, by distress of the goods of the person who *ought to pay the same*, or of any goods and chattels in *his possession* wherever the same may be found within the county.

The defendant states his own appointment as collector, instead of the collectors for 1855 and 1859, but he does not allege that he ever made any demand of the rates in arrear from the person who *ought to pay the same*, though he had no authority to collect from any one but the person *who ought to pay* the amount assessed. He contents himself with alleging that the collectors for 1855 and 1859 demanded the rates from the parties whose names were on the roll, and because fourteen days expired after their several demands, and the taxes were not then paid, he seized the goods of the

plaintiffs on the premises. The defendant does not allege that the plaintiffs were the persons who *ought to pay* the rates in arrear, but assumes that because they were occupying the premises in the latter part of 1861, and had goods in their storehouse, *they were the persons* who ought to pay taxes assessed and demanded in 1855 by some former collector as taxes due by McIntosh and Counter, and in 1859 as taxes due by the occupants and owner in that year. Surely it did not require any great extent of judgment to point out that the rates ought to be paid by the persons who occupied or owned the premises during these years, and that they were the persons legally liable for them.

Against them the collector of 1855, after demanding payment, might at any time after fourteen days have proceeded by distress, and he might have seized any goods which he could have found within the united counties of Frontenac, Lenox, and Addington, belonging either to the occupants or the owner. But instead of the remedy against these parties being pursued within a reasonable period, the collection in one instance is deferred for a period of six years, and in another nearly two years, until the premises are owned and occupied by other parties, and they are attempted to be held liable, *because they hold the premises*, for the taxes of previous occupants and owners. They are not only regarded as the persons who ought to pay the taxes due by others six years ago, which might have been otherwise collected long since, but it is not even thought necessary by the defendant that he should make a demand of them from the plaintiffs before proceeding to distrain. Now it is, I think, quite plain that the defendant in the first place had no right to distrain without a demand by himself personally as collector, and that, if he had any right to distrain against any one under his appointment, the plaintiffs were not the persons *who ought to pay* the rates in arrear.

The defendant alleges that he was appointed to collect the rates in arrear, instead of the collectors for 1855 and 1859, and he professes to be *continuing* the levy and collection of the taxes unpaid to these collectors; but in my

opinion section 104 of the Assessment Act gives no power (after the rolls have been returned to the collectors) to the city council, after a lapse of *several years*, to appoint a person instead of the former collectors to *continue* their proceedings.

That section was intended to give to the council power, by resolution, to authorise the same collector, or any other person in his stead, to continue collections which were being made, but which had not been completed at the time appointed for the return of the collector's roll. But to suppose that it confers upon a council the same power, after the lapse of any number of years, seems to me to be most absurd. If that were so, then the 102nd section, authorising taxes which cannot otherwise be recovered to be *recovered with interest and costs* as a debt due to the local municipality, and the 107th section, which makes taxes which have accrued on land a lien on such land, having preference over *any* claim, lien, privilege, or incumbrance of any party, except the Crown, and not requiring registration to preserve it, would be superfluous. If so summary a mode of proceeding could be adopted, and the party in possession at the expiration of any number of years could be held responsible, the longer, and more expensive, and more dilatory mode would seldom be adopted for the recovery of taxes in arrear.

Having failed to collect the taxes of 1855 and 1859, the only mode of proceeding, as it appears to me, was by action against the persons who ought to pay them; and if the taxes are shewn to be unpaid after every legal exertion to recover them before the return of the collector's roll, the lands remain liable, and may be sold on execution as in any other suit, no matter who may have become the owner in the meantime.

I think it is quite clear that the plaintiffs are entitled to judgment on the demurrer to the avowries.

As to the demurrer to the replication of the defendants to the several pleas of the plaintiffs, and the issue thereby intended to be raised in reference to the *assessment* rolls, it appears to me that the plaintiffs are equally entitled to

judgment. The plaintiffs simply take issue on the various facts set forth in the avowry, some of which are facts which operate in favour of the plaintiffs, but the defendants certainly can have no right to raise any other issue not raised by the pleas.

BURNS, J.—It does not appear to me the defendant has shewn any legal authority in the avowry pleaded for distraining all the plaintiffs' goods. He relies chiefly, first upon the 24th section of the Assessment Act, Consol. Stats. U. C., ch. 55, which enacts that "when the land is assessed against both the owner and occupant, the assessor shall on the roll add to the name of the owner the word "owner," and to the name of the occupant the word "occupant," and the taxes may be recovered from either, or from any future owner or occupant, saving his recourse against any other person; and secondly, upon the provisions of the 104th section, giving the council power to appoint the collector or any other person to collect taxes where the collector has failed or omitted to collect the taxes by the 14th of December in each year.

The first matter for consideration is what is the true meaning of the expression, that the taxes may be recovered from any future owner or occupant, and the expression in the 96th section, "*the collector shall levy the same with costs, by distress of the goods and chattels of the person who ought to pay the same.*" Are they to be construed with reference to the time during which it may be said the collector's roll is in force for each year's taxes, or are they to be understood, as the defendant contends for in this case, as extending over and covering any length of time, so that the plaintiffs' goods are liable to be distrained upon for taxes assessed to another person in respect of the property six years before, and the property having passed through the hands of several persons, perhaps, in the meantime? I entertain no doubt what the proper meaning is.

By the 49th section the assessors are directed to complete their rolls in every year between the 1st of February and such day, not later than the 1st of May, as the council of

the municipality appoints. The assessor of course sets down in his roll the facts in regard to owners and occupiers as he finds them at the time he makes the assessment. Between that time and the time the collector should return the roll, under the 103rd and 104th sections, the property assessed may have changed both ownership and occupancy, by sale, devise, or in various other ways, and in such cases the new owner or occupant may be said to be the proper person or party to pay that year's taxes.

The 105th section directs that the collector shall state in his return of the roll the reason why he could not collect that year's taxes, and if there be no property to distrain, should say so. The land is not thereby excused those taxes, for the 107th section enacts that it shall be a special lien upon it, and therefore it would be incumbent upon a purchaser to make inquiry, for the land itself would be liable to be sold, but that is a very different matter from distraining a purchaser's goods after a lapse of half-a-dozen years for the unpaid taxes.

The avowry states that the collector for the years now claimed returned the rolls as required by law. The 111th section of the act enacts that after the collector's roll has been returned no more money on account of the arrears then due shall be received by any officer of the municipality to which the roll relates, and the 112th section declares that the collection of the arrears shall thenceforth belong to the treasurer of the county alone. If the provisions of the statute had been carried out in respect to the non-payment of the taxes for 1855, the treasurer of the county may now be taking the steps he is directed to do to sell the land, at the same time that the defendant, under the authority he says he has from the municipal council of Kingston, is selling the goods of the plaintiffs for the same taxes.

This brings me to the next matter for consideration, namely, the allegation in the avowry, that in the year 1861 the defendant was appointed, by a resolution of the council, to collect the unpaid taxes remaining upon the rolls of 1855 and 1859, and to collect them from the person or persons who ought to pay the same. The defendant relies upon the

104th section as the authority for the council deputing him now to make collection of those taxes; and it would seem that it is imagined, by combining such an authority with what is enacted in the 24th section of the act, that a power exists by which, as exercised in the way stated here, the goods and chattels of a stranger may be rendered liable to the unpaid assessments against another person, after the lapse of any number of years.

The provisions of the 103rd and 104th sections, when combined in the same act, are not altogether consistent with each other. The first of these names the 14th of December in each year, or not later than the 1st of March in the next year, as the council may appoint, when the collector shall make his final return of the roll to the treasurer; whereas the latter section says that in case the collector does not collect the taxes by the 14th of December, or such other day appointed by the council, the council may by resolution authorise the collector, or any other person in his stead, to continue the levy and collection of the unpaid taxes, but no such resolution shall alter or affect the duty of the collector to return his roll. These provisions were consistent enough with each other when they were respectively enacted, because they were enacted in different years. The first was by 16 Vict., ch. 182, sec. 46, and that gave the council authority to extend the time of payment of the taxes from the 14th of December to the 1st of March in the following year, and for the time of making the final return of the roll to such period. The second provision, which was enacted by 18 Vict., ch. 21, sec. 3, gave the council authority to extend the time for making the return still further, and authority also to appoint another person instead of the collector of the year to collect the unpaid taxes. In order, however, to shew that it was the same year's roll that was being dealt with, and reading the two sections together, as they should be, that it was a provision for extending the time of collection and final return of the collector's roll, the Legislature use the expression that the new or additional power given to the council was in order to continue the levy and collection of the unpaid taxes, but that authority should not alter or affect the duty of the

collector to return his roll. We have acted upon that view of the subject in the several cases cited in the argument, and have held that so long as the collector held the roll not returned, and time given, his authority to collect remained in force.

In the present case it is admitted that the collectors for the years 1855 and 1859 have returned the rolls of those years according to law; but it is contended that the council has the authority to appoint a person, notwithstanding the return of the roll, to collect the unpaid taxes of those years, and make the goods of a stranger to the land assessed in those years liable for it. It is unnecessary in this case, I think, to express any opinion to what extent the Legislature meant the 24th section and the power given to the collector by the 96th section to be carried, in making the goods of persons other than those appearing upon the assessment roll liable for the taxes, beyond the time within which the collector should return his roll, for the case may be decided upon the effect of the 110th, 111th and 112th sections of the act, which place the power of collecting unpaid taxes after the roll has been returned in other hands than the collectors of the municipality. After the collector's return of the roll the municipal council of Kingston had no authority to appoint any one to collect any of the unpaid taxes; the duty of collecting the unpaid taxes from the land belonged to the treasurer.

HAGARTY, J.—The avowry distinctly avers that the collector's rolls for the years 1855 and 1859 respectively were returned by the collector as required by law, and that after the return thereof the defendant was appointed by the council as collector to collect the taxes unpaid thereon.

I am of opinion that after the formal return of the roll by the collector it is not in the power of the council to appoint any person to collect the unpaid rates by distress and sale. Another course is pointed out by the statute to enforce payment, by sale of the land, &c.

Mr. Justice *Burns* has entered fully into these points, and I concur in his opinion.

The plaintiffs do not apparently rely on this bar to the defendant's proceedings, as their demurrer does not object to the avowry on this ground, and in their pleas they actually traverse the fact of the rolls being returned as alleged in the avowry.

We cannot however pass over the statement, fatal as we deem it to the defendant's justification.

Judgment for the plaintiffs on demurrer.

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### MOORE V. HYNES ET AL.

*Sewerage rate—Not a charge on the land—Commutation.*

A sewerage rate imposed by by-law is not a tax upon the land, but a personal charge upon the owner.

Where therefore the plaintiff purchased certain land from the defendants, in respect of which the sewer rate was for three years overdue, which the plaintiff paid, and also commuted for the entire rate as allowed by the by-law: *Held*, that he had no right of action for either of these sums, under the covenants in his deed for seizin and quiet enjoyment, free "from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands."

*Semble*, that even if the rate in arrear were an incumbrance on the land, the payment by way of commutation, being wholly optional, would not be recoverable under the covenant.

THIS was an action brought by the plaintiff against the defendants for the recovery of \$116, paid by the plaintiff to the municipal corporation of the city of Toronto, of which the sum of \$32.97 was for arrears of sewerage rental for the years 1859, 1860, and to June 18th, 1861, of 105 $\frac{1}{2}$ ths feet frontage of the easterly half of lot number six, on the north side of Wellington street, at 12 $\frac{1}{2}$  cents per foot per annum; and by the consent of the parties, and by the order of the Honourable Mr. Justice *Hagarty*, dated the 30th day of August, 1862, according to the Common Law Procedure Act, 1856, the following case was stated for the opinion of the court, without any pleadings:—

#### CASE.

By deed dated the 7th of June, 1861, containing full covenants for title, &c., James Smith and Frederick Smith conveyed to Patrick Hynes and William Hynes, the defen-

dants, the easterly half of lot No. 6, on the north side of Wellington street, containing half an acre of land, more or less, in consideration of the sum of \$2080.

By deed dated the 18th day of June, 1861, and not in pursuance of the Act to Facilitate the Conveyance of Real Property, Patrick Hynes, William Hynes, and Mary Hynes, wife of William Hynes, in consideration of the sum of £728, conveyed the same parcel of land to the plaintiff, Charles Moore, and covenanted in the words and figures following, that is to say :—

“And the said parties of the first part (the defendants) do hereby for themselves, their heirs, executors, and administrators, covenant, promise, and agree to and with the said party of the third part, (the plaintiff,) his heirs and assigns, in manner following, that is to say, that they, the said parties of the first part, at the time of the ensembling and delivery hereof are and stand solely, rightfully, and lawfully seized of a good, sure, perfect, absolute, and indefeasible estate of inheritance in fee-simple, of and in the lands, tenements, hereditaments, and all and singular other the premises hereinbefore described, with their and every of their appurtenances, and of and in every part and parcel thereof, without any manner of reservations, limitations, provisoes, or conditions, other than as aforesaid, (to wit, the reservations, limitations, provisoes, and conditions expressed in the original grant thereof from the Crown,) or any other matter or thing to alter, charge change, encumber, or defeat the same; *and also*, that they, the said parties of the first part, now have in themselves good right, full power, and lawful and absolute authority to grant, sell, alien, convey, and confirm the said lands, tenements, hereditaments, and premises, and every part and parcel thereof, with the appurtenances, unto the said party of the third part, his heirs and assigns, in the manner and form aforesaid; *and also*, that it shall and may be lawful to and for the said party of the third part, his heirs and assigns, peaceably and quietly to enter into, have, hold, use, occupy, possess, and enjoy the aforesaid lands, tenements, hereditaments, and premises hereby conveyed, or intended so to be, with the appurtenances, without let, suit, hindrance, interruption, or denial of them, the said parties of the first part, their heirs or assigns, or any other person or persons whomsoever; and that free and clear, and freely and clearly acquitted, exonerated, and discharged of and from all arrears of taxes and

assessments whatsoever due or payable upon or in respect of the said lands, tenements, hereditaments, and premises, or any part thereof, and of and from all former conveyances, mortgages, rights, annuities, debts, judgments, executions, and recognizances, and of and from all manner of other charges and incumbrances whatsoever. *And lastly*, that they, the said parties of the first part, their heirs and assigns, and all and every other person or persons whomsoever having or lawfully claiming, or who shall or may have or lawfully claim any estate, right, title, interest, or trust, of, in, to, or out of the lands, tenements, hereditaments, and premises hereby conveyed as aforesaid, or intended so to be, with their appurtenances, or any part thereof, by, from, or under, or in trust for them, the said parties of the first part, their heirs or assigns, shall and will from time to time, and at all times hereafter, at the proper costs and charges in the law of the said party of the third part, his heirs and assigns, make, do, suffer, and execute, or cause or procure to be made, done, suffered, and executed, all and every such further and other reasonable act and acts, deed and deeds, devices, conveyances, and assurances in the law, for the further, better, and more perfectly and absolutely conveying and assuring the said lands, tenements, hereditaments, and premises with the appurtenances, unto the said party of the third part, his heirs and assigns, as by the said party of the third part, his heirs or assigns, or his or their counsel learned in the law, shall be lawfully and reasonably devised, advised, or required."

By-law No. 28, of the corporation of the city of Toronto, passed September 8th, 1859, is in the words and figures following, that is to say:—

"Whereas common sewers have heretofore been constructed in various of the streets of the city of Toronto, and the owners or occupiers of certain properties abutting on such streets have drained their property into the said common sewers, and have paid the sum required by by-law to be paid for the privilege of so draining their said properties into the said common sewers, and have not paid towards the construction or maintenance of said common sewers.

"And whereas it is expedient and necessary to pass a by-law to compel the draining of all grounds, yards, vacant lots, or other property abutting on streets where common sewers have heretofore been constructed, and which are opposite to the said common sewers, and to charge the owner or occupier of such grounds, yards, vacant lots, or other

properties, with a reasonable rent for the use of such common sewer, according to the statute in that behalf.

"Therefore the corporation of the city of Toronto, by the council thereof, enact as follows:—

"1. That from and after the passing of this by-law all grounds, yards, vacant lots, or other properties abutting on any street, or any portion of a street, in the city of Toronto, through which a common sewer has heretofore been constructed, and which is opposite such common sewer, shall be drained into such common sewer.

"2. The owners and occupiers of all properties abutting on streets upon which such common sewers have been constructed, who have heretofore paid the sum required by by-law to be paid for the privilege of using such common sewer, shall continue to use the same free of charge for the number of feet for which they have so paid.

"3. All persons who own or occupy property which is drained into any such common sewer, or which is required by this by-law to be drained into such sewer, and who have not heretofore paid for the privilege of so draining aforesaid, shall be charged an annual rental per foot of the frontage of such property abutting on such street or portion of a street as aforesaid, for the use of such common sewer: that is to say:—

"Firstly. In section number one, including all that portion of the city lying between the centre of Parliament street on the east, the centre of Queen street on the north, the centre of Simcoe street on the west, and the waters of the bay on the south, 12 cents per foot per annum.

"Secondly. In section number two, including all that portion of the city lying between the centre of Queen street on the south, the centre of Spadina avenue on the west, the centres of College street, College avenue, and Carleton street on the north, and the centre of Parliament street on the east, 10 cents per foot per annum.

"Thirdly. In section number three, including all those portions of the city not included in sections number one and two, 9 cents per foot per annum.

"4. The owner or occupier of any property so required to be drained by this by-law may within one year commute for the payment of the said annual rent, by a payment at once of \$1, 10c. per foot frontage for property in section No. 1, of 90 cents per foot frontage for property in section No. 2, and of 80 cents per foot frontage for property in section No. 3, deducting in each case one-twentieth of the above-named sums, if the said one-twentieth has been previously paid.

"5. Such annual rent shall be collected by the several collectors of the city of Toronto, or by a collector or collectors specially appointed for that purpose, at the same time and in the same manner, and with the same powers and authorities as any other assessment now is or may be collected.

"6. All grounds, yards, vacant lots, or properties not already drained, abutting on any street, or any portion of a street, in the city of Toronto, through which a common sewer has been constructed, and which is opposite to the said common sewer, shall within fourteen days from the publication of this by-law by advertisement in any public newspaper of this city for one week be drained into such common sewer.

"7. The owner or occupier of any ground, yard, vacant lot, or property abutting on any street, or portion of a street, in the city of Toronto, wherein a common sewer has been constructed, and which is opposite to such common sewer, who shall omit to drain such ground, yard, vacant lot, or property, after the time limited in the next preceding section of this by-law, shall forfeit and pay a sum of not more than \$10 nor less than \$1 for each month he shall omit to do so.

"8. All penalties imposed under the provisions of this by-law shall be recovered on information before the mayor, police magistrate, or any one or more of the aldermen of the said city, together with costs; such penalty in default of payment to be recovered by distress and sale of goods and chattels of the offender, or by imprisonment in case of non-payment of the penalty and costs, or any part thereof, not exceeding thirty-one days."

In 1862 the plaintiff commuted with the corporation, and paid in lieu of the said annual assessment the sum of \$116, including the said arrears.

The defendants were not, nor was either of them, nor was the plaintiff, assessed for the sewerage rate for the said years 1859, 1860, 1861.

The said James F. Smith was assessed for those years.

The said rate and commutation money are only imposed and recoverable by virtue of said by-law and the acts of Parliament on the subject.

The said commutation was not made within one year from the date of said by-law, but was made within one year after the plaintiff became entitled to the property aforesaid under the deed of the 18th of June, 1861.

The question for the opinion of the court is, whether the sewerage in arrear, and due and payable under and by virtue of the said above-recited by-law, and the said commutation money, or either of them, upon said lot number six on the north side of Wellington street, at the time of the purchase thereof by the plaintiff from the defendants, to wit, the 18th day of June, 1861, were or was such an incumbrance upon the land as rendered the defendants liable under their covenant contained in such deed, or merely a claim against the owner or occupant of the land, for which the land itself was not answerable.

If the court should be of opinion in the affirmative as to both or either of the said sums, then judgment shall be entered up for the plaintiff for both or either of the said sums, according to such opinion, and costs of suit.

If the court shall be of opinion in the negative as to both sums, then judgment of *vol. pros*, with costs of defence, shall be entered up for the defendant.

*Eccles*, Q. C., for the plaintiff.

*M. C. Cameron*, contra, cited *Palmer v. Earith*, 14 M. & W. 428.

The statutes bearing upon the question are referred to in the judgment.

HAGARTY, J., delivered the judgment of the court.

On the 7th of June, 1861, James F. Smith and another conveyed certain land on Wellington street to the defendants in fee. On the 18th of the same month and year defendants conveyed in fee to the plaintiff, with certain covenants set out in the case, amongst others, covenant of seisin without any matter or thing, &c., to charge or encumber the lands, covenant for right to convey, and for quiet enjoyment of the lands, "clearly acquitted, exonerated, and discharged of and from all arrears of taxes, and assessments whatsoever due or payable upon or in respect of the said lands."

It was admitted in the argument that there had been for some years a sewer on Wellington street.

The by-law of the corporation imposing a rental for the use of the city sewers was passed on the 8th of September, 1859. Section 3 enacts, that all persons who own or occupy property which is drained into a sewer, or by that by-law is required to be drained thereinto, and who had not previously paid for privilege of draining, should be charged an annual rental per foot frontage of such property abutting on such street, &c., for the use of such sewer, &c., according to the section of the city. The owner of this land would have to pay  $12\frac{1}{2}$  cents per foot per annum. Another section empowers the owner to commute at a specified price within one year. Section 5 directs the annual rent to be collected by the several city collectors, or by a collector specially appointed, at the same time and manner, &c., as other assessments are collected.

Neither the plaintiff nor defendants had been assessed for the sewer rate for 1859, '60, or '61. James F. Smith had been so assessed for those years. Within a year after getting his deed from defendants the plaintiff commuted with the city council for \$116. Of this sum \$32.97 was for arrears for 1859, '60, and to June, 1861.

By section 297, sub-section 20, of the Municipal Act, Consol. Stats. U. C. ch. 54, the council may pass by-laws "for charging all persons who own or occupy property which is drained into a common sewer, with a reasonable rent for the use of the same, and for regulating the time or times and manner in which the same is to be paid."

Section 299 gives power to pass by-laws for assessing and levying on the real property to be immediately benefited by the making or enlarging, &c., of any sewer, &c., a special rate for sinking fund and payment of debentures to be issued therefor, &c., and gives power to assess it in various ways, and for commuting with parties assessed.

This power seems limited to local improvements, and has to be very specially exercised. The by-law before us does not seem to be framed thereunder.

This special power also gives authority to council to decide whether the assessment to be raised shall be so much in the dollar or by an annual rate of so much per foot equally,

according to frontage of property so benefited, without regard to comparative value.

The Municipal Act contains little more from which we can obtain any information on the point in issue, namely, the liability of the land, and not merely of the owner or occupant, for rent of sewer.

We now turn to the Assessment Act, Consol. Stats. U. C., ch. 55. Section 8 enacts that all municipal, local or direct taxes or rates, shall, when no other express provision has been made in this respect, be levied equally upon the whole rateable property according to assessed value, and not upon any one or more kinds of property, &c.

Section 11. The council shall make annual estimates of all sums required for their lawful purposes.

Section 12. And may pass one or more by-laws to levy a rate of so much in the dollar upon the assessed value of property as they deem sufficient to raise the sums required.

The assessor makes out a roll specifying each property. Land occupied by the owner shall be assessed in his name; and by section 24, when land is assessed against both owner and occupant, the assessors shall in the roll add to the name of the owner "owner," and to the name of occupant "occupant," *and the taxes may be recovered from either, or from any future owner or occupant, saving his recourse against any other person.*

Section 87 prohibits a non-resident, not on the roll, from performing statute labour in respect of his land, but he is to be charged with a commutation tax, which shall be charged against every separate lot according to value.

By section 89 the clerk is directed in the collector's roll to put in separate columns any local rate, or school rate, or other special rate, the proceeds whereof are required by law or by the by-law imposing it to be kept distinct and accounted for separately; the name of each person assessed, and "the amount with which the party is chargeable in respect of sums ordered to be levied by the council for the purposes thereof, or for commutation of statute labour."

Section 102 provides, that if the taxes payable by any person cannot be recovered in the special manner pointed

out, they may be recovered as a debt due to the municipality, the production of the roll relating to the taxes payable by such person to be *prima facie* evidence.

Section 107. The taxes accrued or to accrue on any land shall be a special lien on such land, having preference over any claim, &c. &c.

After return of the roll the list of lands in default for taxes is furnished to the county treasurer, and after accumulation of five years' arrears they can be sold by the sheriff, who however can levy such arrears off any distress to be found on the land.

By section 168 arrears of taxes due to cities on lands of non-residents shall be funded, collected, and managed in the same way as like arrears due to other municipalities, the chamberlain and high bailiff acting as treasurer and sheriff.

We have thus given a short view of all the clauses which we think bear on the question before us in these two statutes.

The plaintiff insists, first, that he is entitled to recover the whole sum paid by him as commutation to release the property wholly from the sewer rent; and secondly, that in any event he should recover the rent in arrear for 1859, '60, and '61.

We are unable to see on what principle we could accede to his larger demand. The act of commutation was wholly optional with him. The deed on which he founds his claim speaks of arrears of taxes and assessments, and indemnifies him therefrom. We can see nothing in it from which we can gather that the vendors guarantee to him an estate wholly freed, both present and future, from taxes or assessments of any kind. Vendor and vendee deal together for the transfer of land, which they must be assumed to know has to bear its share of municipal burdens, and the very provision against arrearages avows their knowledge on this point. The existence of any right, legislative or municipal, by which any tax could be as it were capitalized and paid off by one sum for ever, is, we take it, a mere privilege to an owner, and the commutation sum in gross cannot, we think, be looked upon as an existing encumbrance on such covenants as we see before us.

We feel much doubt on the remaining point.

If the arrears be, as the plaintiff contends, a charge or lien on the land, he is, we think, clearly entitled to recover. He will fail, on the other hand, if defendants' argument be sound, that this sewer rent was purely a personal claim on the owners of the property.

The language of the acts is by no means free from ambiguity. The statutable authority under which the by-law was passed is "to charge all persons who own or occupy property which is drained into a common sewer, or which, by any by-law of the council, is required to be so drained, with a reasonable rent for the use of the same, and to regulate the time and manner in which the same is to be paid."

The by-law founded thereon does not in terms profess to assess or charge anything on the land itself, but enacts that the owners or occupiers shall be charged an annual rental per foot of the frontage of such property, according to situation, and directs such annual rent to be collected at the same time, and in the same manner, and with the same power and authority as any other assessment may be collected.

The point for decision may be stated according to our view to be, whether this sewer rent, rate, or tax is by law charged upon the land itself, or upon the occupant or owner in respect of the land.

The nearest analogy we can find is under the poor-law rating.

The 43 Eliz., ch. 2, directs the overseers to raise weekly or otherwise by taxation of every inhabitant, parson, vicar, and every occupier of lands, houses, &c., in such competent sums as they shall think fit, the various enumerated moneys and provisions for the poor.

In various books we find it laid down that poor rates are not taxes on the land itself, but only on the occupants in respect thereof. The land tax under various statutes is a direct assessment on the lands themselves.

Platt on Covenants, page 222, says: "Church and poors' rates being charges on the person, and not on the land, are not comprised within a covenant by a lessor to pay all the taxes on the land demised, nor within a covenant by

him to indemnify the lessee against all duties, charges, and taxes whatsoever to be imposed upon the lands except tithes."

Case v. Stephens, (Fitzgibbon, 298,) is expressly in point on this head. Eyre, C. J., says: "The poor and church rates are taxes payable in respect of the land, but they are not payable out of the land, for the personal estate only is subject to them, whereas the land tax does immediately charge and affect the land."

Theed v. Starkey (8 Mod. 314) is to the same effect. Burn's Justice, Title "Poor," 141, *et sequ.*, gives a list of decisions on the subject.

Jeffrey's case, 5 Coke 66*b*, Woodfall L. & T. 420: "The poor's rate is not a tax on the land, but a personal charge in respect of the land." This is Lord Mansfield's language in Rowls v. Gells, Cowp. 452.

The principle of the land itself being exempt, and yet the occupant assessable in respect of his beneficial enjoyment, is very fully considered in Lord Bute v. Grindall, (1 T. R. 338,) and our own Assessment Act, ch. 55, sec. 9, adopts the same principle as to Crown lands when occupied by any person otherwise than in his official capacity, "the occupant shall be assessed in respect thereof, but the land itself shall not be liable."

On the whole, therefore, we come to the conclusion that the sewer rent charged under this by-law is not a tax or charge upon the land, within the covenant now before us, and that the defendants are entitled to judgment.

Judgment for defendants.

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IN THE MATTER OF SECKER, AND PAXTON, TREASURER OF  
THE COUNTY OF ONTARIO.*Assessment Rolls—Mistake—Correction—Mandamus.*

One S. from 1858 to 1861, inclusive, occupied, as lessee, a house and land adjoining on lot 24, part of which lot in 1854 had been laid out by his landlord into village lots and a plan filed. He had been regularly assessed and had paid for the premises thus occupied by him, but the whole of lot 24 had during these four years been returned as non-resident. After the treasurer had issued his warrant for sale to the sheriff, he was applied to to correct the mistake in the rolls, so as to except the part occupied by S. from that returned, but he refused to do more than allow the sheriff to deduct the amount paid by S., who to relieve his goods from seizure paid under protest the taxes on the remainder of lot 24, \$228. He then applied for a mandamus to the treasurer to make the correction, but the court refused to interfere.

*C. S. Patterson* obtained a rule *nisi*, calling on William Paxton, the younger, the treasurer of the county of Ontario, to shew cause why a writ of mandamus should not issue, commanding him to correct the error which had occurred in the assessment rolls of the township of Pickering, for the years 1854, 1855, and 1856, in returning lot number 24 in the first concession of the said township as an undivided lot, as non-resident land, instead of returning the several subdivisions thereof as shewn on the plan of Edward Shortis, deposited in the registry office for the county of Ontario, and to insert on such rolls lots numbers seven and eight as shewn on the said plan as subdivisions of the said lot number 24, and assessed for a proportionate part only of the tax assessed against the whole lot, and to correct all entries in the books of him, the said treasurer, and in the warrant delivered by him to the sheriff of the said county, so as to correspond with the alteration so made in the said rolls.

In support of this application three affidavits were filed: one from the applicant, Robert Secker; one from his attorney, W. H. Billings; and one from Mr. James Black, a student at law.

It appeared by the affidavit of Secker that he had occupied a house as tenant of Mr. Edward Shortis, in what he called the town of Liverpool, for four years, from 1858 to 1861, inclusive, and that he had also occupied part of lot number 24 adjoining: that he had been regularly assessed and paid for the premises occupied by him: that in 1854 Mr.

Shortis subdivided a part of lot number 24 into village lots, and lodged a plan in the registrar's office of the county, which still remained in that office: that the house occupied by him stood on lots seven and eight of such subdivision: that the assessors of the township of Pickering had, during the years '58, '59, '60, '61, as well as former years, returned the whole of lot number 24, in the first concession, as absentee land, Edward Shortis not residing in the township, and had not noted on their rolls any subdivisions of the lot or the portions on which he, Secker, was living, and for which he was assessed, so that he had paid the assessments on the part occupied by him, and the same had been returned with the whole lot as non-resident land.

It appeared by this affidavit, as well as the affidavit of Mr. Billings, that the treasurer had declined to make any corrections in his books for the years 1854, '55, '56, and '57, but that he had authorised the sheriff to deduct the amount of tax paid by Secker during the four years of his occupancy, and that Secker had been obliged to pay \$223.81, taxes on the remaining portion of the lot, in order to release his goods from seizure by the sheriff, the amount so paid being paid under protest.

*M. C. Cameron*, shewed cause, and cited *Rex v. Hughes*, 3 A. & E. 429; *Rex v. The Lords Commissioners of the Treasury*, 4 A. & E. 297.

The sections of the statute cited are referred to in the judgment.

MCLEAN, C. J., delivered the judgment of the court.

The applicant, Secker, is not satisfied that the treasurer has gone far enough in relieving him from the amount which he has previously paid when assessed in the township, but insists that the treasurer shall correct the whole collector's roll received by him from the treasurer of Pickering, in which number 24 is returned as the land of a non-resident, and that he shall enter the subdivisions into which Mr. Shortis in 1854 is said to have divided the lot, and then that lots numbers 7 and 8 shall be marked as assessed, and the other portion put down as non-resident land.

The treasurer under the 126th section of the Assessment Act does not feel warranted in making the alterations required, or receiving any payments since the issuing of the warrant. He is indeed expressly prohibited by that section from receiving any payments since his warrant was issued, and it does not appear that he was applied to previously to make the alterations and deductions required. He has, according to the affidavits, consented so far to relieve the applicant, Secker, as to allow the sheriff to deduct what has been paid by him for the four years of his occupation under previous assessments, though by the affidavit of the treasurer such deduction appears to have been made by the sheriff on his own responsibility.

The treasurer, previous to the issuing of his warrant, might, under the 113th section of the Assessment Act, have relieved Secker from the payment of tax on any portion of the lot except the subdivisions which he was occupying; but he could not reasonably expect that the treasurer should on his application alter his books or the collector's roll in reference to taxes which had accrued for the four years previous to his occupation, when for aught that appears the house and the whole lot number 24 may have been unoccupied and correctly returned as non-resident land.

The treasurer has made an affidavit showing that when Mr. Shortis purchased the lot he gave a mortgage to the original owner to secure the purchase money: that he afterwards subdivided a portion of the lot into village lots, and built a house, but never sold any portion of the ground: that the mortgage has been foreclosed, and the land has reverted to the mortgagee, and that none of the subdivisions are divided from the other portions of the lot or occupied separately, and on that account he has not been willing to have the subdivision entered on the collector's roll so as to be separately assessed: that he was not satisfied there was any palpable error in the assessment of the lot in the years 1854, 1855, and 1856; and that though Mr. Shortis did make certain subdivisions, yet that the mortgagee or present owner is not bound by such subdivisions, no portion of the land being sold.

A certificate appears to have been presented to the clerk of the township for signature, to be addressed to the treasurer, with a view of notifying him of certain errors in the mode of assessment of the lot number 24, but the clerk declined signing it, alleging that he did not think he would be justified in so doing, although he did not deny the correctness of the same. Mr. Black's affidavit relates wholly to the presentation of that certificate to the clerk, and his refusal for the reason stated to sign it. The affidavit does not state that there was any conversation about the tenor of the certificate; but because he did *not deny* its correctness it appears to be assumed that he must be taken to have admitted it, though he declared that he did not think he would be justified in signing it. The treasurer certainly could not be expected to be influenced by a certificate which the clerk refused to sign.

We think that the circumstances appearing in the treasurer's affidavit, as well as in the affidavits in support of the application, are such as to afford ample grounds for not interfering by mandamus with the treasurer in the discharge of his duty, especially after the whole amount demanded has been levied under the warrant and paid over to the treasurer. The amount has been paid under protest; and if more has been paid than Secker was legally liable for, he must seek his remedy against his landlord, or any other person who may be liable to refund it to him.

The rule *nisi* for a mandamus must be discharged with costs.

Rule discharged.

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IN THE MATTER OF RIDSDALE AND BRUSH, CLERK OF THE  
CORPORATION OF THE TOWN OF AMHERSTBURGH.

*Roman Catholic separate schools—Claim of exemption by Protestants as subscribers to—Misconduct of clerk—Mandamus.*

A rate having been imposed for the purpose of building a new school-house in the town of Amherstburgh, certain persons who were not Catholics, but Protestants, signed a notice to the clerk, he himself being one of them, that as subscribers to the Roman Catholic separate school they claimed to be exempted from all rents for common schools for the year 1861; and the clerk thereupon, in making up the collector's roll, omitted this rate opposite to their names.

*Held*, that the clerk, who had been notified before making up the roll that it would be illegal to exempt these persons, had done wrong, and might be punished under C. S. U. C., ch. 55, secs. 171, 173, but that the court could not in the following year interfere by mandamus to compel him to correct the roll.

IN Hilary Term last *Robert A. Harrison* obtained a rule calling upon the clerk to shew cause why a writ of mandamus should not issue, commanding him either in the collector's roll of the town to set opposite the lots or parcels of land as therein described of Thomas F. Park and eleven others named, the amount for which each of them was chargeable for school rates during the year 1861, erroneously omitted therefrom, or to certify the error to the collector of the municipality, or to the treasurer of the county, upon the ground that the persons were liable to taxation for common school purposes in the town.

This rule was obtained upon affidavits, stating the following circumstances to be true in fact:—That the appellant was a ratepayer of the town, as were also the twelve persons mentioned: that the common schools were managed under a board of school trustees, and that there was also a separate school, a Roman Catholic school, managed by a separate board of trustees: that the corporation of the town, at the request of the board of school trustees, passed a by-law to raise for common school purposes the sum of \$450 for the year 1861, which sum was intended to be expended in the building of a new schoolhouse. The supporters of the Roman Catholic school had, on the 1st of February, 1861, given by the hands of one of the trustees thereof a notice to the clerk of the municipality, in the following words:—

“ We, the undersigned, subscribers of the Roman Catholic separate school, town of Amherstburgh, claim to be exempted from all rates relating to common schools and common school libraries for the year 1861.”

This notice was signed by all those who had formerly supported the separate school, and in addition thereto, for the year 1861, by the twelve persons mentioned. The clerk of the municipality was one of the twelve persons. It was said that none of these twelve persons were Catholics, but, on the contrary, were Protestants, and that the object in their subscribing the notice was to claim exemption from paying, and to avoid being assessed for any part of the money with which to build the schoolhouse. The persons named, it was said, owned a great deal of property in the town, and were on the assessment roll assessed for the ordinary town taxes in other respects; but that the town clerk, Thomas H. Brush, in making up the roll for the collector, had omitted to carry out opposite to their names any rate whatever in respect of the sum so directed by the by-law, upon the ground that those persons were to be considered as exempted from the rate by reason of their being supporters of the separate school.

It was sworn that in the early part of the year, and before the roll was made up, it was intended to exempt these persons from payment of the rate; and Brush, as the town clerk, was notified that it would be illegal to exempt these persons, for that they were not Roman Catholics. The roll, however, was delivered to the collector having no rate in respect of common schools to be paid by these persons set opposite their names or property. On the 3rd of February, 1862, a written notice was served upon Brush, requesting him to set opposite to the names of the persons mentioned in the roll the amount for which each person was chargeable for school rate for the year 1861, or to certify the same to the collector of the municipality, or to certify the same to the county treasurer.

During last term *Prince* shewed cause, and filed affidavits in reply. In none of the affidavits was it denied that any of the persons mentioned were not Roman Catholics. Two

of these persons said they had been supporters of the separate school before the year 1861, and had sent children to the separate school. The clerk stated that he had sent his children to the separate school before 1861, but he had never claimed exemption till 1861.

The collector's roll was delivered to the collector on the 21st of November, 1861, and he refused to allow any alterations while in his hands.

Consol. Stats. U. C., ch. 55, secs. 89, 104; ch. 64, sec. 27, sub-sec. 12; ch. 65, sec. 18 *et sequ.*, secs. 29, 31, were referred to in the argument.

BURNS, J., delivered the judgment of the court.

This case is a most curious one in many respects, and exhibits the ingenuity of the human mind to devise ways and means for evading payment of what the Legislature thought was perfectly plainly expressed. We mean in cases where people think their pockets are touched upon by those having such power as school trustees and others in a similar position.

We take it to be perfectly plain, from reading the Common School Act, chapter 64 of the Consol. Stats. of U. C., chapter 65, providing for separate schools, and chapter 55, the Assessment Act, that the Legislature intended the provisions creating the common school system, and for working and carrying that out, were to be the rule, and that all the provisions for the separate schools were only exceptions to the rule, and carved out of it for the convenience of such separatists as availed themselves of the provisions in their favour.

The persons mentioned as having signed the notice before stated have not in that notice, which Mr. Brush seems to have very strangely acted upon, told us that they were or are Roman Catholics. All they have said is, that they claim to be exempted from all rates relating to common schools, because they are subscribers to the Roman Catholic separate school. That is not the class of persons the Legislature was providing for. The provision was and is for those who not only supported the separate school, but for such persons as were in a position to claim the exemption

from paying to the common schools by reason of their being Roman Catholics. The two things must combine, and in the present case it would be impossible to bring into operation the provisions of the 31st section of the act, chapter 65, with regard to the penalty for making a false statement in the notice; for though it may be quite true the persons are supporters of the separate school, a thing perfectly legal if they choose to do so, yet they have not said they are supporters because they are Roman Catholics.

The 29th section of the act has not been complied with by those who were claiming the exemption from paying the school rate.

But suppose the notice given might be considered as sufficient to exempt the persons signing it from payment, we must see how Mr. Brush has acted upon it. He seems to have thought that he, as the clerk of the municipality, had a right to omit on the collector's roll carrying out the rate to his own name and the others who signed that notice. This is a clear violation of his duty as prescribed by the 89th and 90th sections of the Assessment Act, chapter 55 of the Consolidated Acts. When the town council passed the by-law authorising the levying of such sum as the school trustees required, it was the duty of the clerk to calculate the rate that each person should pay according to the assessed value of his property, and set the sum down in the collector's roll. Whether the individuals named in the collector's roll would be exempt from payment of any sum or rate mentioned in the roll depended upon something else, which the clerk in the discharge of his duty, as far as making out the roll according to law, had nothing to do with.

The 29th section of chapter 65 does not exempt those who are Roman Catholics supporting a separate school from having taxes imposed upon them; it only exempts them from the *payment* of all rates imposed for the year for the support of the common schools, provided they give the notice mentioned in the section. To enable those who are thus by law exempt from payment of the rate imposed the 30th section provides for the clerk of the municipality

giving a certificate to the person giving such notice of the effect of it, and the date of such notice, so that when the collector called for the rate the person holding the certificate could shew that he was not liable to pay, but was exempt from paying the rate. When the Legislature intended the names of any persons supporting separate schools should be omitted from the collector's roll, they have said so, as in the provisions for separate schools for Protestants and coloured persons.—See sections 12, 13, and 14 of chapter 65.

It appears that the roll was delivered to the collector on the 21st of November, 1861, and the collector states that he collected a great portion of the rates before the 14th of December, and that the council extended the time for making his return to the 14th of March, 1862, and by that time he had collected all the rate except from some indigent persons. Whether the roll yet remains in the collector's hands does not appear. Mr. Brush's duty as clerk of the municipality ended when he completed the roll and placed it in the hands of the collector for the collection of the rates. We can nowhere find that it is laid down, either in the Assessment Act or the Municipal Act, that it is the duty of the clerk to certify either to the collector or to the treasurer any errors which may have been made. There are provisions with respect to errors and mistakes made, and that the lands stated shall not be exempt from the taxes by reason of the error or mistake, but we can nowhere find it stated to be a duty upon the clerk of any municipality to certify to any other person or authority when such error or mistake exists or has been made.

We can see very plainly that in this case Mr. Brush has not discharged his duty as he should have done, but then we cannot see our way clearly to rectify that now, under the circumstances of this case, by the writ of mandamus as sought for. The effect of granting the writ would be to invest the collector, if he still remain in office, with an additional duty and liability, in the event of the roll being now made right, as it should have been when first delivered to him, and in case of the collector being out of office, or the roll returned, to create some confusion in the treasurer's

accounts or mode of dealing with the matters provided for in the statute.

The 171st and 173rd sections of the Assessment Act provide for punishing the clerk of a municipality who refuses to do his duty, or who commits malversation in the discharge of it, by indictment. The insinuations thrown out in this case against Mr. Brush are of the latter description. So far as the complaint affects him personally the remedy provided for by statute should be pursued. Adopting such a course or omitting to do so would not in either case prevent the remedy by mandamus in order to correct the error in the discharge of the duty of the clerk, if the duty be plain and clear. There is no difficulty in pronouncing that the clerk in this instance did not discharge his duty according to law, but the difficulty consists in saying that we can by mandamus at this stage of the proceedings order him to do anything which will have the effect of remedying the defective execution of his duty. After giving the matter much thought and consideration, we have arrived at the conclusion that we must discharge the rule for the mandamus.

Rule discharged, without costs.

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### SLOAN V. CREASOR, ATKINSON, AND MCKERNAN.

*Division court bailiff—Misconduct—Action against his sureties—Prior judgment against the bailiff.*

The plaintiff sued C., a division court bailiff, and his sureties, on their covenant that the bailiff would not misconduct himself in office, alleging a judgment recovered by himself against C., for selling his goods under execution contrary to the orders of the plaintiff in the suit, and a *fi. fa.* on such judgment returned *nulla bona* as to part, and claiming to recover the balance.

*Held*, (affirming the judgment of the county court,) that the declaration was bad, for the plaintiff having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause of action.

APPEAL from the county court of the county of Simcoe.

The declaration alleged that the defendants by their covenant, on the 1st day of January, 1858, covenanted and promised in the sums of money therein mentioned, that the defendant John Creasor as bailiff of the first division court of

the county of Simcoe, should duly pay over to such person or persons entitled to the same all such moneys as he should receive by virtue of his said office of bailiff, and should and would well and faithfully perform the duties imposed upon him as such bailiff by law, and should not misconduct himself in the said office to the damage of any person being a party in any legal proceeding; and the plaintiff averred that after the making of the said covenant, and whilst the said defendants John Atkinson and Daniel McKernan were so sureties for the said John Creasor as such bailiff, one John Ardagh recovered a judgment in the said first division court for the county of Simcoe against the plaintiff for a certain amount therein mentioned; and then it proceeded to set forth the issuing of a warrant of execution for the amount so recovered, together with the costs of suit, and the delivery of such writ to the defendant John Creasor, as bailiff of the said court, for the purpose of levying the amount endorsed on such execution to be levied from the goods of the said plaintiff: that after the delivery of the writ to the said John Creasor the said John Ardagh countermanded the execution of the same, or the levying on the plaintiff's goods under the said writ, on the plaintiff paying to the said John Creasor all his costs by reason of the said writ being in his hands as such bailiff: that the plaintiff tendered to the said John Creasor all costs due on the said writ, but that Creasor refused to accept the same, and refused to stay proceedings on the said writ; and afterwards, while the said order of the said John Ardagh was in full force to stay the proceedings on the said *fi. fa.*, the said defendant John Creasor wrongfully, illegally, and contrary to his duty in that behalf, did, under pretence of the said warrant of execution, seize, take, and carry away certain goods and chattels of the plaintiff, to wit, a large quantity of wheat in sheaf, a large quantity of peas in the straw, and one hundred and fifty bushels of potatoes, and did afterwards wrongfully sell the same, the said order to stay proceedings and countermand not having been in any wise revoked, cancelled, or annulled.

The declaration then averred that for such seizing and taking of the plaintiff's goods, and the wrongful conversion

of the same, the plaintiff commenced an action of trespass in the county court against the said John Creasor, and that by the consent of the parties in the said action, their counsel and attorneys, and by an order of the said court, the said action and all matters in difference therein were referred to the award and arbitrament of John Strathy, Esquire, and that within the time appointed for making an award the said John Strathy did make an award in favour of the plaintiff for \$78.25, for his damages by reason of such wrongful taking and conversion, and that the costs of the said action, reference, and award were duly taxed to the said plaintiff at the sum of \$97.38. The declaration then set forth a judgment obtained on the said award for the damages and costs, and that an execution issued thereon, and was delivered to the sheriff of the county of Simcoe, endorsed to levy the sum of £43, 18s. 1d., being the amount ordered to be paid on the said award and costs, and the sum of £8, 15s., being the costs taxed and ordered to be paid by the rule to enforce the payment of the said award, and the costs attending the proceedings for the said rule and the judgment entered thereon; and that the said sheriff afterwards returned the said writ of *fieri facias* with an endorsement that he had made thereon the sum of \$37.80, and that the defendant John Creasor had no other goods or chattels within his bailiwick whereof he could cause to be made the residue of the said money. The declaration then concluded by alleging, "And so the plaintiff saith that the said defendant John Creasor did not well and faithfully do and perform the duties imposed upon him as such bailiff by law, and did misconduct himself in the said office of bailiff to the damage of the plaintiff, being a party in a legal proceeding, contrary to the said covenant, whereby the plaintiff hath sustained the said damages; and the plaintiff claims fifty pounds."

The defendants demurred to this declaration, alleging, among other grounds of demurrer, that the plaintiff having recovered judgment against Creasor for the wrong, was precluded from suing on the covenant; and judgment having been given for the demurrer in the court below, the plaintiff appealed.

*McCarthy*, for the appellant, cited *McArthur v. Cool*, 19 U. C. R. 476; *Thompson v. McLean*, 17 U. C. R. 495; *Sanderson v. Hamilton*, 1 U. C. R. 460; *McIntosh v. Jarvis*, 8 U. C. R. 533; *Nelson v. Baby*, 14 U. C. R. 235, 238; *Miller v. Tunis*, 10 C. P. 423; *Barker v. St. Quintin*, 12 M. & W. 441; *Hunt v. Hooper*, *Ib.* 664; *Drake v. Mitchell*, 3 East 257; *Bell v. Banks*, 3 M. & G. 258.

*Osler*, contra, cited *Stephen on Pleading*, 288; 1 Saund. 276; Bac. Abr. "Statute" L.; *Hoye v. Bush*, 2 Scott N. R. 86; *Peppercorn v. Hoffman*, 9 M. & W. 618, 628; *King v. Hoare*, 13 M. & W. 494; *Joule v. Taylor*, 7 Ex. 61.

MCLEAN, C. J.—The plaintiff appears to have brought this action, not for the purpose of recovering again such damages as a jury may give him for the tort of the bailiff against him and his sureties, but rather for the purpose of recovering the balance due upon the execution in the suit against the bailiff alone. If that were not the case it is difficult to imagine why the plaintiff should set out on the record anything connected with the suit against the bailiff, and the reference of that suit to arbitration, and the issuing an execution and levying a specific amount of the moneys endorsed to be levied on that execution. Had it been intended to act independently of the judgment recovered against Creasor, and to proceed *de novo* for the same cause of action against Creasor and his sureties, there could have been no necessity to set forth anything but the cause of action alleged in the district court suit—that is, the seizing and selling the plaintiff's goods after he had been directed not to do so by Ardagh—and then the allegation that in doing so he had misconducted himself and caused damage to the plaintiff, a party in the suit or legal proceeding at the suit of Ardagh, contrary to the terms of the said covenant, whereby an action had accrued to the plaintiff to recover from the said defendants the amount of the said damages, the matter would have been sufficiently plain; but if that was all that was intended the declaration certainly sets out a good deal of irrelevant matter, and the statement at the close "whereby the plaintiff has sustained *the said damages*" might have

been confined to a specific amount arising from the tort of the bailiff.

On the argument, however, the plaintiff argued that notwithstanding the recovery against Creasor and the levying of a portion of the damages awarded against him, he had a right to bring a second action for the same cause, and recover damages a second time for precisely the same tort. It is quite plain that there is no covenant set out a breach of which would render the sureties or their principal liable to the plaintiff for payment of any damages recovered against the bailiff individually, for a tort committed in the discharge of his duty. Then, taking the conclusion of the declaration to apply to the act of trespass, for which the plaintiff shews that he has already recovered, and that the intention is to endeavour again to recover against Creasor and his sureties, it becomes necessary to look at some of the grounds of demurrer urged by the defendants against the declaration.

The sixth objection is, that "the plaintiff having sued for the wrong in the county court elected his remedy, and cannot now sue Creasor, or he would be made twice liable for the same cause, contrary to the maxim, "*Nemo debet vis vexari pro eadem causâ*," &c., and the matter has become "*rem judicatam*;" and the seventh is, "that the plaintiff having referred his grievance against Creasor to arbitration, thereby discharged the sureties from liability, and as to Creasor the wrong has become a debt, and a matter adjudicated upon."

Either of these objections, I think, must be fatal to the plaintiff's recovery. The action is against the defendants jointly, and on a covenant said to have been made by them under their respective seals in the sums of money therein mentioned; and it is alleged that they covenanted and promised that the defendant John Creasor, as bailiff of the first division court, should duly pay over to such person or persons entitled to the same all such moneys as he should receive by virtue of the said office of bailiff, and should not misconduct himself, &c.

The covenant being sued upon as a joint one, any matter

which will discharge one of the defendants will equally discharge all, for there can be no recovery against two of the defendants, who are bound only with a third person jointly to do a particular act. In the case of *King and another v. Hoare*, (13 M. & W. 493,) and the numerous cases cited by Mr. Baron *Parke* in the judgment given by him in that case, the principle is clearly established, that where judgment has been obtained for a debt, as well as a tort, the right given by the record merges the inferior remedy by action for the same debt or tort against another party, and that in cases of joint contracts or joint torts there can be no distinction made when there is but one cause of action in each case. The party injured may sue all the tort-feasors or all the contractors, or he may sue one, subject to the right of pleading in abatement in the one case and not in the other, but for the purpose of the decision in that case they are upon the same footing; whether the action is brought against one or two, it is for the same cause of action. It is also said in the same cause by the learned baron that if there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result.

In the case of *Buckland v. Johnson*, (15 C. B. 145,) the same principle is also recognised, and at page 166 *Maule, J.*, says: "Having his election to sue in trover for the value of the goods at the time of the sale, or for the proceeds of the sale as money had and received, the plaintiff elected the former remedy, and he has obtained a verdict and judgment. He has therefore got what the law considers equivalent to payment, namely, a judgment for the full value of the goods. \* \* \* When the plaintiff made his election to sue in trover for the value at the time of the sale, he was bound by the estimate of the jury, \* \* \* and having once recovered in respect to the same goods the plaintiff cannot again recover the same thing against somebody else. There is an

end of the transaction. Having once recovered a judgment his remedy was altogether gone : his claim was satisfied as against all the world. He was in fact in the position of a person whose goods had never been converted at all."

In the case of *McArthur v. Cool et al.*, in our own court, (19 U. C. R. 476,) it was held that the plaintiff had at one time a cause of action for the money sought to be recovered against Cool, a division court bailiff, and the other defendants his sureties ; but that having elected to proceed in an action of trespass against Cool, the plaintiff could not afterwards sue on the covenant for money had and received by the bailiff for the same cattle for the taking of which the verdict in trespass had been recovered. That decision is binding until reversed by the judgment of a court of appeal ; and upon the authority of that case, as well as the others cited, I think this appeal against the judgment of the learned judge of the county court on the several causes of demurrer must be discharged with costs.

HAGARTY, J.—The declaration in this case is framed apparently in conformity with that in *McArthur v. Cool*, (19 U. C. R. 476.) There the covenant was stated jointly, not jointly and severally, and the statute not referred to. On objection taken the court say it can be supported as a joint covenant, although the sums for which each is respectively bound are different.

The statute is not here referred to, and the covenant is stated as joint, not joint and several. This creates a difficulty in my mind.

The three defendants, Creasor, Atkinson, and McKernan, covenant jointly that Creasor shall not do any act to the damage of the plaintiff. The declaration alleges an act so done, and a judgment in tort recovered against Creasor alone therefor, and part payment on such recovery. After that can this action be maintained against the three defendants on a joint contract ?

The case of *King v. Hoare*, (13 M. & W. 504,) and *Buckland v. Johnson*, (15 C. B. 145,) seem strongly against the plaintiff's right.

Assuming the alleged wrong done here to be within the covenant, the plaintiff, when Creasor injured him, had two remedies—one against him alone for the tort, the other against him and the other defendants on the joint contract that he should not commit any such tort.

Let us now see *Parke*, B.'s, words: "If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment recovered in a court of record, the judgment is a bar to the original action, because it is thereby reduced to a certainty, and the object of the suit attained as far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, '*transit in rem judicatam*,' the cause of action is changed into matter of record, and the inferior remedy is merged in the higher. This appears to be equally true where there is but one cause of action, whether it be against a single person or many. The judgment of a court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action being single, cannot afterwards be divided into two. \* \* \* *Popham*, C. J., states the true ground. He says: 'If one hath judgment to recover against one, and damages are certain,' (that is, converted into certainty by the judgment,) 'altho' he be not satisfied, yet he shall not have a new action for the trespass. By the same reason, *e contra*, if one hath cause of action against two, and obtain judgment against one, he shall not have remedy against the other; and the difference betwixt this case and the case of debt and obligation against two is, because there every one of these is chargeable and liable to the entire debt; and therefore a recovery against one is no bar against the other until satisfaction.' And it is quite clear" (continues *Parke*, B.,) "that the Chief Justice was referring to the case of a joint and several obligation. \* \* \* We do not think that the case of a joint contract can in this respect be distinguished from a joint tort. There is but one cause of action in each case." The judgment is lengthy, and thus concludes: "These considerations lead us, quite satisfactorily to our own minds, to the con-

clusion, that where judgment has been obtained for a debt as well as a tort, the right given by the record merges the inferior remedy by action for the *same debt or tort* against another party."

To succeed in this action the plaintiff must, I think, maintain that where a man covenants not to do an act in itself the subject of trespass, and having done the act he is sued and judgment recovered against him expressly for the trespass, he can again be sued on his covenant, the same act of trespass being laid as the breach. This I consider cannot be permitted by the law. If, therefore, here the defence as to Creasor is a good bar, it is difficult to see how it must not equally be so as to his co-defendants.

Considering that the plaintiff fails on this ground I have not considered several other points suggested.

BURNS, J., concurred.

Appeal dismissed.

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## HAMILTON ET AL. V. McDONALD.

*Sale for taxes in District of Ottawa in 1839—Lapse of time between warrant and sale—7 W. IV., ch. 19—1 Vict., ch. 20—3 Vict. ch. 46—Distress between inception and completion of sale—Effect of.*

In ejectment on a sale for taxes of land in the District of Ottawa, made in June, 1839, it appeared that the land had been returned as in arrear for eight years to the 1st of July, 1828, £3, 5s., and for nine years up to the 1st of July, 1829, £3, 13s. 1½d., and a warrant issued on the latter return to sell for £3, 5s. The sheriff had returned the lot as sold to one M., and it was marked in the treasurer's books as "paid sheriff to 1st July, 1829." On the 17th of September, 1836, it was again returned as in arrear for eight years, to the 1st of July previous, £3, 5s., and a warrant to sell issued on the 20th, returnable at the Quarter Sessions on the 26th of June then next. On the 4th of March, 1837, the 7 W. IV., ch. 19, was passed, altering the mode of sale and directing that all sales should take place on the second day of the Quarter Sessions. This caused delay, and on the 6th of March, 1838, by the 1 Vict., ch. 20, all sales for taxes were postponed until the expiration of that year. On the 17th of April, 1839, the land was offered under the provisions of the 7 W. IV., ch. 19; and no bidders appearing, the sheriff adjourned the sale to and sold on the 19th of June, instead of waiting, as directed by that statute, until the Quarter Sessions next after the expiration of the six months' notice required. By 3 Vict., ch. 46, the sales made in June, 1839, were confirmed, and under the provisions of that act the sheriff in 1842 conveyed to the plaintiff.

*Held*, 1. That under these circumstances the warrant issued in 1836 had clearly not lapsed or become void before the sale.

2. That there were in fact eight years' taxes in arrear at the time of sale, for the warrant issued in 1829 was for taxes only up to the 1st of July, 1828, though it might properly have been for another year in addition.
3. *Per McLean*, C. J., that the evidence of distress (set out below) having been left to the jury, who found for the plaintiffs, their verdict must be taken as shewing that there was none at any time before the sale. *Per Burns and Hagarty*, J. J., that the learned judge was right in directing the jury that the existence of distress between the 17th of April, when the land was first offered, and the sale on the 19th of June, would form no objection, as the sheriff was not bound to search then. *Quære*, whether in any case a search could be required between the inception and completion of the sale.

EJECTMENT, for part of lot number 41, in the 9th concession of the township of Osgoode, 195 acres, commencing at the front angle of the said lot, on that side from which the lots are numbered, and measuring backwards, taking a proportion of the width of the said lot corresponding in quantity with the proportion of such lot in regard to its length and breadth to make the said 195 acres.

The plaintiffs claimed under a deed from Charles P. Treadwell, sheriff of the late Ottawa District, to Charles A. Low, and by various deeds derived from the said Charles A. Low and persons claiming under him.

The defendant denied the title of the claimants, and asserted title in himself by length of possession.

The writ issued on the 28th of October, 1861, and the defendant's appearance was entered on the 24th of February, 1862.

On the trial, before *Richards, J.*, at the last autumn assizes at Ottawa, an exemplification of a patent from the Crown was put in for the whole lot, in the name of Mary Markle of Williamsburgh, as the daughter of Henry Markle, Esquire, a U. E. Loyalist.

*David Pattee*, the present clerk of the peace, who had possession of the papers of the clerks of the peace who preceded him, produced from his office a return of the treasurer to the court of Quarter Sessions of the then district of Ottawa, of lands in arrear for taxes up to the 1st of July, 1836, bearing date the 17th of September, 1836. Thos. H. Johnson was the treasurer of the district then. Lot number 41, in the 9th concession of Osgoode, was returned as eight years in arrear, with £3, 5s. 0d. due of taxes thereon.

He also produced a warrant, bearing date the 20th day of September, 1836, signed R. P. Hotham, clerk of the peace, district of Ottawa, directed to the sheriff of that district, directing him to sell the lot in question, amongst other lots in arrear for taxes mentioned in the said warrant, and commanding the sheriff to have the moneys which he should make under the said warrant before the court of General Quarter Sessions, to be holden in and for the said district on the 26th day of June then next ensuing. Mr. Pattee proved that there was no return in the office to the warrant: that Charles P. Treadwell, Esquire, was then sheriff of the district of Ottawa, and had always since been sheriff, and that the deed to Charles A. Low under seal, under which the plaintiffs claimed, bearing date the 30th day of June, 1842, was executed by C. P. Treadwell as sheriff. The deed was registered, as appeared by certificate endorsed, on the 5th day of July, 1842.

Mr. Pattee also produced from the office of the clerk of the peace a return of lands in arrear for taxes up to the 1st of July, 1828, in which return this lot appeared in arrear

for eight years, amounting to £3, 5s. 0d., and also a return of lands in arrear for eight and nine years' taxes up to the 1st of July, 1829, made by the then treasurer, Donald McDonald, in which return £3, 13s. 1½d. was said to be due on this lot. The latter return was approved of and signed by David Pattee, chairman of the court of General Quarter Sessions, in open court, on the 16th of September, 1829. Upon that return so approved a warrant was issued to the sheriff, signed by R. P. Hotham, as clerk of the peace, dated the 16th September, 1829, which authorised the lot to be sold for £3, 5s. 0d., arrears of taxes.

Copies of the return of arrears and warrant to the sheriff to sell were put in, and of a return said to be from the sheriff, by which the lot numbered 41 in the 9th concession of Osgoode was returned as having been sold to one Milloy. That return was made by Alexander McDonell as sheriff. He preceded the present sheriff, C. P. Treadwell, in the office of sheriff.

*Chas. P. Treadwell*, sheriff, who was appointed in 1835, sold the land under the warrant produced on the 19th of June, 1839, for the arrears of taxes due up to 1836. The lot was offered at 2s. 6d. an acre on the 17th of April, and no purchaser offered, and the sale was adjourned till the 19th of June, when it was sold, and a certificate given to Messrs. Hamilton and Low as the purchasers.

The land was not conveyed by deed until 1842, in accordance with the statute 3 Vict., ch. 46, passed on the 10th of February, 1840, and this lot was advertised amongst the rest as that act directs. A copy of such advertisement, as the same was published in the Upper Canada Gazette, bearing date on the 4th day of June, 1840, and containing the lot in question, was produced, stating the destruction of the books of the treasury of the Ottawa District by fire in January, 1834, and giving notice to all persons holding receipts signed by any treasurer of that district prior to May, 1835, for taxes on any lands therein mentioned, of the sale of such land since the destruction of the treasury books, and requiring them to forward to the treasurer of the said district within three years from the date of the said notice all

receipts they held for payment of taxes on any of the lands in question, in order that the same might be redeemed; but should such persons holding such receipts neglect to forward them as therein required the sale was declared legal by statute 3 Vict., ch. 46.

The lot in question was sold to Hamilton and Low, and after the death of Mr. Hamilton it was conveyed to Low. The original receipt given on the day of sale was got back when the deed was executed. The sheriff stated that he did not recollect having been on or over the lot before the day of sale, but that he had made enquiry from persons living in the township, and had done all that was necessary or reasonable to satisfy himself that there was no distress on the lot from which the taxes could have been levied.

*J. W. Marston*, treasurer of the Counties of Prescott and Russell, produced the original sheriff's return of the sale of lands for taxes in 1839, due up to 1836, and a certified copy was said to be put in, but it was not among the papers filed.

*Duncan McFarlane* was called for the purpose of proving that at the time of the sale in 1839 there was no improvement whatever on the lot, and no property from which the taxes could have been levied by distress. He stated that he first knew the lot in 1837: that it was then wild, in a state of nature: that he lived on the adjoining lot: that he went there in 1837, and left in 1839, and that he saw no improvements made in the meantime: that he was living with the defendant clearing land for him in 1837 and 1838: that he commenced in March, 1837, and left in April, 1839, and there could have been no clearing or improvement without his knowing it. He said he could not be positive as to the line of the lot, but that there was an old line up to which they chopped, and that no part of the chopping was over that line, or on number 41, while he was there.

*William Carthew* was called for the same purpose, and stated that he had known the lots in that vicinity for 22 years last spring, and the lot in question was then all bush: none of defendant's improvement was on it then according to the line: that witness lived part of the time two miles from the lot, and a good part of the time within a mile, and worked

for the defendant, and had to cross the lot: that there was a shanty on it which some lumbermen had put up the same winter, before he moved up in the spring: that he did not know of any line in 1840, but according to the present line the lot was in a state of nature then.

The several deeds and conveyances from Charles A. Low to the plaintiffs were admitted, and the chain of title appeared to be correct.

*For the defence.*

*Campbell* moved for a nonsuit, on the grounds—1. That the warrant for the sale of land for taxes issued on the 20th of September, 1836, had lapsed and was void on the 19th of June, 1839. 2. That it was void also as being for arrears up to the 1st of July, 1836, whereas the writ shewed that the arrears were for one or two years less than eight years, because the taxes due for 1829 must be presumed to have been made on the first sale in 1829. 3. That there was no sufficient evidence of no distress on the lot on the day of sale or previously. 4. That there was not sufficient time between the first offering for sale and the second, which should be six months, and the Quarter Sessions subsequent to the six months. 5. That the treasurer's return did not shew the lot eight years in arrear at its date. 6. That the warrant did not appear to have been issued by order of the court. 7. That the lot having been bid off by Hamilton and Low, the conveyance could not be made to Low. 8. That there was no evidence of the parties, Hamiltons, through whose wills the parties claimed. 9. No evidence of the sheriff having made a return of the lands sold to the provincial secretary.

*Mr. Marston*, a former witness, was then recalled, and stated that the two Hamiltons were dead: that the father died, as he thought, in the winter of 1839, in January, and that his son died in 1858. He further stated that in the land book the lot was marked, "Paid sheriff to 1st July, 1829," and in a paler ink marked, "Paid sheriff to 1st July, 1836." That would be the sale of 1839: that shewed the money received from the sheriff, and might have been on the land being sold.

The learned judge left the question of distress to the jury, and overruled all the defendant's objections except the 1st, 2nd, and 5th, on which leave was reserved to the defendant to move the court.

The defendant's counsel then called several witnesses, with a view of proving defendant's occupation, or that there was an improvement made and distress on the premises.

The first witness, *Nehemiah Corkner*, stated that he first saw the lot in 1840: that he lived in Winchester in 1841, but lived with defendant from May till October of that year: that in the spring of 1841, when he first went there, he thought there was chopping and clearing on a portion of it, with stubble on it, more than a quarter of an acre: he thought (did not doubt) there was half an acre, some logged, some logged and cropped, and some had not been logged. Witness had not the least doubt there was more than an acre with stubble on it. He hired in May 1841: was planting potatoes: making fence: fenced in the whole, rough and smooth, as it was. The piece fenced in in 1841 the witness said he had seen since: it was on the side of the line between 40 and 41: he was satisfied it was on number 41: he had been there recently. He was thirteen years of age then, and was thirty-four past when giving evidence: there was a side road between numbers 40 and 41: the posts standing: the road not open: it was no part of the eight acres which the witness spoke of. On cross-examination he stated he lived in Winchester, about a mile from the lot: that the other witness was his uncle: that he travelled the road: his uncle travelled also: there was an old kind of a fence part of the way; his uncle told him it was a line: the bit of stubble spoken of was along the edge of the fence: thought it was 12 rods wide: no fence now where the old fence was formerly: part of it was between the two lots: witness knew 20 years ago the stubble was on number 41: the new line proves it: it was witness's impression then it was on the line: the fence then there was not put there to divide 40 from 41: it was merely put up to include his crop: it was wheat stubble, thinks spring wheat: it was dug up that year: no potatoes there then: it was not a

square piece: it was not cleared up in 1841; put in a good piece with potatoes in 1841: they made a fence round that: some more land was cleared: it commenced fifty or sixty rods from the head line: all the rest was bush: no occupation of it: witness not sure any portion of it was cut at that time: saw no indication then of timber having been cut upon the lot. They moved up from Hawkesbury in 1840: no line run then: a distinct line: there is a line now but no fence on it: not so much enclosed now as there was then.

*Alexander Meldrum* stated that he knew the lot in 1839: that he lived 24 acres from it in the spring of the year with his brother, and worked a good deal for defendant: that he helped him to log a piece of that lot in the spring of 1839, and potatoes were planted on it: there was an acre and a half, but witness would not swear to more than an acre: they were not a failure that year: thinks there are between eight and ten acres now improved on the lot: witness saw the acre of potatoes on the lot exclusive of the road allowance: thinks they were planted early in May: can't say what they were worth on the 19th of June: thinks he would give \$16 for an acre of potatoes then. The road allowance was not fenced off: the road is run off in the middle of the road: its place easily to be seen: it was not run then: it was run two or three years ago by Mr. Woods, a surveyor. On cross-examination the witness said he could not swear it was lot 41 then: he thought it was: it was all enclosed in defendant's own field: no fence on the potatoes: can't say if any part of 40 was fenced in with the potatoes: no lines were run then; the place where the potatoes were planted was cleared up that spring, 1839; they were planted by defendant and servant girl; defendant claimed the potatoes.

At the close of the case *Lewis*, for the plaintiffs, in reply to the claim of title set up by defendant by reason of his length of possession, contended that in consequence of the passing of the act 3 Vict., ch. 46, the authority to transfer lands sold and not redeemed was suspended for a time, and that the sale was rendered valid only by the default of any person producing a receipt for the taxes paid previous to the

sale, or proving such payment by affidavit; that the plaintiffs could not enter after such sale until a deed from the sheriff was obtained, and that the Statute of Limitations could not run till such right of entry had accrued.

The learned judge held that there was nothing to shew that there was any distress on the premises until after the spring of 1839: that the lot having been first offered for sale at the quarter sessions on the 19th of April, 1839, and the potatoes planted in May following, the sheriff was not bound to look for a distress on the premises after his sale had in fact begun: that as to the Statute of Limitations, it had not commenced to run against any one, that this lot was wholly unimproved, and there was nothing to shew that the grantee of the Crown was aware of any one being in possession, so that the statute would not begin to run against her under 4 Wm. IV., ch. 1, sec. 17, and the purchaser's right to enter did not accrue until after the two years limited by the special act, and the conveyance of the premises to the plaintiffs.

The jury found for the plaintiffs.

In Easter term *Robert A. Harrison* obtained a rule to shew cause why the verdict entered for the plaintiffs should not be set aside, and a nonsuit entered, pursuant to leave reserved, on the grounds following:—

1. That the warrant for the sale of lands issued on the 20th of September, 1836, had lapsed and was void at the time of the sale, on the 19th of June, 1839.

2. That the sale on the 19th of June, 1839, was void, having been for eight years' alleged arrears of taxes up to the 1st of July, 1836, while there were not in fact eight years' arrears, the taxes for 1829 appearing by the documents filed to have been made on the previous sale; and even if not so made, there still were not eight years between the 1st of July, 1828, (up to which time it was proved by the plaintiffs' witnesses taxes had been paid,) and the 1st of July, 1836, as the first year could not be counted, for the reason that the taxes of that year were not in arrear till its expiration.

3. That the treasurer's return did not shew the last eight years in arrear at its date, and in fact there was no proof of the writ having been grounded upon such a return as the law required.

Or why the said verdict should not be set aside, and a new trial had between the parties, on the ground of misdirection, in this, that the learned judge told the jury that if satisfied there was no distress at the time of the inception of the sale they might find for the plaintiffs, whereas he should have told them that if there was a distress at any time between the attempted sale and the adjourned sale, which the sheriff might by enquiry have ascertained, then that the sale was illegal and void; and on the ground of misdirection in this, 1. That the learned judge refused to tell the jury that there was no sufficient evidence of there being no distress on the land at the time of the issue of the writ or the time of sale, and that there being none the jury should find for the defendant. 2. That there was not sufficient time between the first offering for sale and the second, which should be at the next quarter sessions subsequent to the six months, and that the sale was therefore void. 3. That there was no evidence that the warrant to sell was issued by authority of the court of quarter sessions. 4. That the land having been sold to Hamilton and Low, and the certificate of sale thereof so granted, the deed to the son without proof of assignment from father to son was unauthorised, illegal, and void. 5. That there was no evidence of any return of the sale made by the sheriff to the secretary and registrar of the province, as required by the statute.

And on the ground that the verdict was contrary to law and evidence on the grounds aforesaid, or some of them, and on these further grounds, that there was clear evidence of a sufficient distress at or before the sale, whereby the sale was void; and that the plaintiffs' right to possession was barred by the Statute of Limitations.

During this term *Richards*, Q. C., shewed cause.

*Robert A. Harrison* supported the rule, citing *Doe Bell v. Reaumore*, 3 O. S. 243; *Doe Upper v. Edwards*, 5 U. C.

R. 594; Munro v. Grey, 12 U. C. R. 647; Todd v. Werry, 15 U. C. R. 614; Errington v. Dumble, 8 C. P. 65.

The statutes cited are referred to in the judgments.

McLEAN, C. J.—Leave was reserved at the trial to move for a nonsuit on three of the objections then taken, the 1st, 2nd, and 5th, and the question as to there being any distress on the premises from which the taxes in arrear could be levied was submitted to the jury. The other objections were overruled, so that if there was anything in them they can only form grounds on which a new trial should be granted.

The first objection urged on the application for a nonsuit is, that the warrant issued for the sale of lands for taxes on the 20th of September, 1836, had lapsed and was void at the time of the sale, on the 19th of June, 1839.

The treasurer's return of taxes in arrear for assessments and road tax in the Ottawa district, for eight years, in whole or in part, up to the 1st of July, 1836, bears date on the 17th of September, 1836. Upon that return, under the 7th section of 6 Geo. IV., ch. 7, it became the duty of the clerk of the peace to make out a writ for the levying of the assessments appearing to be due in each township, according to a form given in a schedule annexed to the act—and the section provides that the writ may be signed and sealed by the clerk of the peace, *as by order* of the court of general quarter sessions, *either during or after the sitting of that court*—to be directed to the sheriff, directing him to levy the amount therein stated to be due, with certain fees, by sale of such portion of the lands and tenements on which the assessments are respectively chargeable as may be sufficient for that purpose, provided there be no distress upon the said lands from whence the same may be made, and if there be such distress, then to levy the same by sale of such distress. The clerk of the peace appears to have performed the duty enjoined upon him by that section very promptly, for his warrant is dated the 20th of September, three days after the date of the treasurer's return, and is returnable before the

court of quarter sessions, to be holden on the 26th of June then next, 1837.

The operation of the writ was suspended by the passing of an act by the Legislature on the 4th of March, 1837, 7 Wm. IV., ch. 19, by which a different mode of sale was introduced, and all lands were required to be sold at the court house in each district on the second day of the sitting of the quarter sessions, and only so much of each lot was authorised to be sold as would at 2s. 6d. per acre produce the amount to be levied. The second section of that act then provides, that in case no bidder shall be found who will accept the quantity of land exposed to sale at its valuation, then the sheriff shall, *without any new writ*, expose so much of the land for sale under the provisions of the law then in force, (as if that act had not been passed,) as may be necessary for making the amount he is directed to levy, together with lawful interest thereon from the time the same became due, at the next court of general quarter sessions which shall occur after the expiration of the *six months' notice* required by law.

The sale at the court house, instead of in the several townships as previously required, had to be advertised; and it appears that at the April quarter sessions, in 1839, the lands were offered for sale at the upset price of 2s. 6d. per acre, and the sale was postponed for want of bidders.

If the Legislature had not interfered, the sale under the original warrant could have been completed within the time limited for its return to the general quarter sessions, 20th of June, 1837; but in consequence of such change, and the necessity of acting under and giving notice of the proposed sale according to the new mode prescribed, the sale was delayed; and on the 6th of March, 1838, the Legislature again interfered, and in consequence of the depression which then generally prevailed postponed all sales of land then liable for arrears of taxes till the expiration of the year, and provided that after that the same proceedings should be had as if no such postponement had taken place.

The proposed sale at the quarter sessions on the 17th of April, 1839, at 2s. 6d. an acre, was a part of the proceed-

ings which became necessary after the postponement till the expiration of 1838; and after such offer to sell the sheriff, according to the second section of the act 7 W. IV., ch. 19, should have postponed the sale till the quarter sessions next after the expiration of six months' notice required by law. He seems, however, to have sold on the 19th of June, 1839, as appears by his certificate to Messrs. Hamilton and Low of that date, as the purchasers of 195 acres of the lot in question.

If this sale had been regular, on the 19th of June, the purchasers would have been entitled to a deed after the expiration of a year from that date if the lot remained unredeemed; but the sale being before the expiration of the time limited an application was made to the Legislature, and on the 10th of February, 1840, a special act was passed, 3 Vict., ch. 46, by which the sales of lands in the district of Ottawa which were effected by the sheriff of that district for arrears of taxes in the *month of June* then last past, are declared to be *confirmed* and made valid, to the same extent as if the act first recited therein, (7 Wm. IV., ch. 19,) had never been passed.

By the same section it is made the duty of the sheriff to publish a list of the lands sold by him at the sale in June, in the *Upper Canada Gazette*, and in one newspaper in the Eastern and Bathurst districts respectively, and also in not less than four public places in the district of Ottawa; and then the sheriff is authorised within two years after the date of such advertisement to convey to the respective purchasers the lands so sold, according to the manner and form prescribed by law: provided, however, that nothing in that act contained shall be construed to give effect to or make legal and valid any sale of lands for taxes where such lands were not liable to the rates and assessments imposed by the laws of this province, or to be returned by the treasurer as in arrears for such rates and assessments.

The 2nd, 3rd, and 4th sections of the act (3 Vict., ch. 46) provide for difficulties arising from the destruction by fire of the treasurer's office of the Ottawa district, in January, 1834; and the 6th section provides that the period required to intervene (by the 2nd section of the act 7 W. IV., ch.

19) between the offer to sell at 2s. 6d. an acre and the final sale of such lands, shall be the interval between the day when such lands shall be offered for sale upon such terms and the second day of the court of General Quarter Sessions then next following; but in all cases where a longer period has been construed and acted upon by any sheriff, such construction, and all acts thereunder performed by such sheriff, shall be thereby confirmed and made valid, any law to the contrary notwithstanding.

The sheriff produced a copy of the advertisement published by him in the *Upper Canada Gazette*, pursuant to the terms of the last-mentioned act, bearing date the 4th of June, 1840, and he proved that he had given the other notices by that act required, and further, that he gave a deed for the lot in question to Charles A. Low, one of the purchasers, (the other being dead,) on the 30th day of June, 1842, and received back from him his original certificate given to Hamilton and Low as the purchasers on the 19th of June, 1839. It is quite evident from the interference of the Legislature—first with the mode of sale, and next with the postponement of all sales till the expiration of the year 1838, but above all by the express recognition and confirmation of the sales on the 19th of June, 1839—that the warrant under which that sale took place, though issued in 1836, cannot be held to have lapsed or become void, and therefore the first objection wholly fails.

Then as to the second objection, that the sale is void, being for eight years' taxes up to the 1st of July, 1836, while there were not in fact eight years' taxes in arrear—the period from the 1st of July, 1828, to the 1st of July, 1836, not making eight years, and the taxes being proved to have been collected up to the 1st of July, 1828—it was not necessary that there should be a full period of eight years actually in arrear, it was sufficient if any portion of the amount was eight years in arrear to justify a proceeding to collect by sale.

There are two extracts of returns of the treasurer of the Ottawa district put in, one for arrears of taxes due for eight years up to the 1st of July, 1828, and the amount is stated

at £3, 5s., and the other shewing taxes in arrear for eight and nine years on the lot in question, and the amount due stated at £3, 13s. 1½d. This latter return is marked : "Approved in open court, and the clerk is directed to act hereupon forthwith according to the statute," dated 16th September, 1829, and signed "David Pattee, Chairman." And there is also the treasurer's return of the 17th September, 1836, of land on which taxes were due for eight years, *in whole or in part*, up to the 1st of July, 1836, including the lot in question.

The warrant of the clerk of the peace bears date on the 16th of September, 1829, the same day on which the treasurer's return of lots in arrear for eight and nine years up to the 1st of July, 1829, appears to have been given in, and this lot put down as in arrear for £3, 13s. 1½d. The warrant might certainly have included all the arrears due according to the treasurer's return up to the 1st of July, 1829; no previous warrant appears to have been issued for arrears due for eight years up to the 1st of July, 1828, nor was it incumbent upon the magistrates to direct a warrant to be issued on receiving the treasurer's return for that period.

The warrant of the 16th of September, 1829, is, however, only for arrears due for eight years (£3, 5s.) on the lot in question; so that if eight years were due in 1828, and amounted to £3, 5s., and in 1829 the amount was £3, 13s. 1½d., the amount due from the 1st of July, 1828, to the 1st of July, 1829, is not included in the warrant, and must have remained unpaid when the warrant of the 20th of September, 1836, was issued. If that be so, then, reckoning from the 1st of July, 1828, to the 1st of July, 1836, there would in truth be eight years in arrear according to the treasurer's return of the 17th of September, 1836. The fact of the warrant of the 16th of September being only for eight years, when it might have been for nine, I apprehend cannot vitiate any sale made for taxes under it, for in truth there was more due than was directed to be levied under it, and the owners of lots could not complain that less was required to be paid by them than was actually due.

Then under the warrant of 1836 only the eight years actually in arrear was attempted to be enforced. I cannot

see that the delay in collecting the taxes from 1828 till 1829 until the expiration of another period of eight years, and then reckoning that year as the first of the second period of eight years, can have produced any injustice whatever. The owners had less to pay on the first sale, and they had only what was actually due to pay on the second.

As to the third objection, that the treasurer's return does not shew the last eight years in arrear at its date, and in fact that there was no proof of the writ having been grounded upon such a return as the law required, it is sufficient to say that the treasurer's return bears date on the 13th of September, 1836, and represents the arrears due on this lot as amounting to £3, 5s., for a period of eight years up to the 1st of July, 1836; and that the warrant of the clerk of the peace is in strict accordance with the return, and issued under the authority conferred on that officer by the 7th section of the act 6 Geo. IV., ch. 7. This is the last of the objections on which the application for a nonsuit professes to be founded, and in my opinion all are equally untenable.

Then as to the application for new trial, and the grounds on which it is made, it appears to me that the ruling of the learned judge on the several points was quite correct. There was an attempt made on the part of the defendant to show that there was distress on the premises from which the tax could have been levied. A witness swore that potatoes were planted, as he thought, early in May, 1839, on a piece of ground which he had helped to log that same spring. He would only swear to an acre, though there might be an acre and a half; and though he professed not to know what they were worth, he said he thought that on the 19th of June he would give \$16 for an acre. On his cross-examination he was obliged to confess that he could not have told at the time what lot the potatoes were on: that there was no line run at that time, and that a line had only been run within a few years.

Another witness for the defendant stated that he worked with defendant from May till October, 1841. He was then only thirteen years old, and in the spring of 1841 he saw wheat stubble on a bit of land—he thought more than a

quarter of an acre—which he was satisfied from seeing the premises since was not on number 41.

On the part of the plaintiffs two witnesses were called, who were well acquainted with lot number 41, both of whom worked for defendant. One left in April, 1839, and declared that at that time the lot was all bush, without any improvement whatever. The other had known the lot 22 years last spring. There was no line then run, but according to the present line it was in a state of nature when he saw it 22 years ago, (which would be in the spring of 1840.)

The whole evidence was left to the jury as to the alleged distress on the premises, and they found for the plaintiff, as I most certainly would have done had I been one of their number. The verdict on that point I think is quite satisfactory, and must be taken as a decision on the part of the jury that the evidence of the plaintiffs shewed that in fact there was no distress even so late as 1840 from which the taxes could have been levied.

Then, if that be so, the opinion expressed by the learned judge, that if after the inception of the sale in April, 1839, the distress was on the premises, but not before, the sheriff's proceedings would not be irregular unless he had notice of a distress and failed to take it, becomes unimportant. If the learned judge had been in error as to the necessity of searching for distress even up to the last moment before the sale, still the whole question of distress or no distress having been left as a matter of fact to the jury, and they having found against the defendant upon sufficient evidence, the opinion of the judge, even if incorrect, could not be treated as misdirection. It would only be incumbent on the sheriff to look for distress if there were any, but the jury have found there was none, and his sale cannot be affected by his omitting to look for what there was not.

Then as to the Statute of Limitations, it is clear from the 3rd sec., ch. 88, Consol. Stats., U. C., that as to lands in a state of nature the statute does not commence to run unless it can be shewn that the grantee or person claiming under him had knowledge of the same being in actual possession of some other person. The grantee of the Crown would only

be barred from the time such knowledge was obtained, and any other owner of the lot would stand in the same position. The defendant appears by the evidence never to have been in occupation of the lot; and though he may by accident or design have cleared a small portion of ground beyond his own limit, there is nothing to show that it was done with any view to the assertion of a right, or that the plaintiffs were at any time aware that the defendant was in fact trespassing on their land, nor is there anything to shew that the alleged clearing has not been made on that part of the lot which has not been purchased by the plaintiffs.

The defendant, besides denying the plaintiffs' title, by his notice asserts title in himself by length of possession; but in fact there is no evidence of any length of possession, and the question as to distress was in no other way important except as the deed to the plaintiffs might be affected. If there was sufficient distress while the warrant was current then the sale of the land could not be supported, and the deed to the plaintiffs could confer no title under which they could recover. I think the verdict is conclusive that there was neither distress at the time of sale nor at any time previous thereto, nor any possession on the part of the defendant which could prevent the plaintiffs from recovering.

I am of opinion that upon all the grounds taken on behalf of the defendant the rule must be discharged with costs.

BURNS, J.—There is only one point upon which I feel it necessary to make any remark in addition to what the Chief Justice has said.

It was moved as one of the grounds of the rule that the learned judge misdirected the jury, in telling them that if they were satisfied that there was no distress on the land at the time of the inception of the sale they might find for the plaintiffs, whereas the defendant contended that if there was a distress to be found on the land between the day the sheriff attempted first to sell and the day he actually sold, the sheriff would be wrong in selling, and that it was the sheriff's duty to ascertain before he did sell whether there was any distress.

I do not understand that the learned judge did leave the question to the jury broadly to say whether there was any distress or not upon the land before the time of actual sale; and, if the defendant's witnesses spoke the truth, before the actual day of sale there had been some potatoes planted on the land, and it becomes necessary to say whether or not the learned judge's charge was strictly correct. I think it was quite correct.

The sheriff on the 17th of April, 1839, offered the land for sale, and could obtain no purchaser. At that time the whole lot was in a state of nature, and there is no pretence for saying that previously to that time there was any distress to be found. The sheriff then adjourned the sale until the 19th of June, and between those dates the defendant trespassed upon the land by planting some potatoes. The sale was begun on the 17th of April, and it was no unreasonable time for the sheriff to extend it to the 19th of June, and I see nothing to cast any obligation on the sheriff to ascertain whether the owner of the land or any one else had altered the position of it between the 17th of April and the 19th of June. We must bear in mind that the taxes must be in arrear for the space of eight years before any warrant to sell can be placed in the hands of the sheriff. The sheriff must publicly advertise before he can sell, and when he does sell the owner may redeem the land within a year from the time it is sold. If the sheriff should postpone a sale for such a length of time that there might be some reason for apprehension of a change in the circumstances of the land with respect to occupation, so that a distress might be found, then it might be proper to hold that it was the duty of the sheriff before he actually did sell to ascertain again by inspection whether or not he could levy the taxes by distress, but under the facts of this case I think the charge of the learned judge was quite correct.

HAGARTY, J.—I think the learned judge was right, without laying it down as a rule that in no case is a sheriff bound to enquire as to distress between the day first named for the sale and the adjournment. That may be ultimately

settled as the law, but in this case it appears to me that the search was clearly unnecessary.

Rule discharged.

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STINSON ET AL. V. MARTIN ET AL.

*Action on bond of submission—Objections to award—Finality—Certainty—Pleading.*

The plaintiffs declared on a bond given by two defendants, for the performance of an award to be made in pursuance of an agreement to refer. This agreement, as set out, was between the defendant M. and the plaintiffs, reciting that certain differences had arisen between them as to the damages sustained from the non-performance by either of the conditions contained in a lease of a certain farm; and also as to the damages which the plaintiffs, or either of them, were entitled to recover from M. for the surrender of said lease, if the arbitrators should determine that no forfeiture of it had occurred; and also respecting the damages which S., one of the plaintiffs, was entitled to recover from M. for wrongfully causing a warrant to be issued and arresting him on a charge of stealing: that another dispute had arisen as to the right to the possession of certain goods, for which an action of replevin was then pending by M. against the plaintiffs, and the damages which they, or either of them, had sustained by reason of such replevin: that another dispute had arisen as to the right to possession of certain other goods then on the said farm, and that a suit had been brought by the plaintiffs in the name of S. against M. in the division court—and by the agreement these and all other matters in difference between the parties were referred to two arbitrators named, and such third person as they should appoint before proceeding with the reference.

The declaration then alleged that the arbitrators, as to the first cause of dispute, awarded that neither M. nor either of the plaintiffs had sustained damage from the non-performance of the lease: that no forfeiture had occurred: and that for the surrender of it by the plaintiffs to M. the plaintiff S. was entitled to receive from M. \$200, to be paid forthwith; but that as H., the other plaintiff, had already received a sum therefor, he was entitled to nothing further. As to the second matter referred, they awarded \$50 to be paid forthwith by M. to S. As to the third subject of reference, that M. was not entitled to possession of the goods, and they awarded to the plaintiff Is. for his damages by reason of the replevin. As to the fourth dispute, that M. should pay S. \$110 forthwith, for the share of S. in the produce of the said land, and in the goods demised by the lease; and lastly, that S. was not entitled to recover in the division court suit, nor to receive anything further from M.: that M. was entitled to nothing from S.; and that H. was entitled to nothing from M., nor M. from him. The breaches assigned were non-payment of the several sums awarded to S.

*Held*, on demurrer on various grounds, that the declaration and award were good: that the other defendant was liable for the non-payment of the \$50, though it was a matter in difference between the plaintiff S. only and M.; and that the replevin suit, and the right to the possession of the goods in question therein, and of the other goods, were clearly and finally disposed of.

The defendants also pleaded, setting out the whole award as stated in the declaration, and alleging that it was void on the face of it, for not deciding all the matters referred, for want of finality, and for excess of authority.

*Held*, on demurrer, plea bad, as putting in issue matter of law already brought up by the demurrer.

THIS action was brought on a bond, in the sum of \$1000,

given by the defendant to the plaintiff, subject to a condition that if John Martin, one of the defendants, his executors, &c., did and should well and truly pay, perform, and keep any award that might be made by one Daniel Lamon and John Tweedie, and such third party as they should appoint, or a majority of them, respecting certain matters in dispute between the plaintiff and the defendant, John Martin, which they had agreed to refer to arbitration, pursuant to an agreement made and entered into between the said defendant John Martin and the said plaintiffs, then the said bond to be void, otherwise to be and remain in full force and effect.

The agreement to refer was alleged in the declaration to be a certain deed made by and between the said John Martin of the first part and the plaintiffs of the second part, in which deed it was recited that certain differences had theretofore arisen between the said parties as to the damages which the said parties of the first and second parts, or either of them, had sustained by reason of either of the said parties not fulfilling, observing, and performing the stipulations, covenants, and provisoes made and contained in a certain indenture of lease made by and between the said parties, demising and leasing lot number 27 and part of lot number 28, in the third concession of the township of Whitby, and also as to the damages the parties of the second part, or either of them, were entitled to have, receive, and recover of and from the party of the first part, for the surrender of the said lease, in the event of the arbitrators, or a majority of them, determining that no forfeiture of the said lease had occurred; and also respecting the damages the said Edward Stinson was entitled to recover from the said Martin for wrongfully and improperly causing and procuring a certain warrant to be issued and arresting the said Stinson on a charge of stealing; and in and by the said deed it was further recited that a certain other dispute had arisen between the parties thereto, as to the right to the possession of certain goods and chattels, for which an action of replevin by the said party of the first part was then pending against the said parties of the second part, and the damages of the said

parties of the second part, or either of them, by reason of such replevin; and it was by the said deed further recited that a certain other dispute had arisen between the said parties, as to the right to the possession of certain other goods and chattels then being on the said farm, and also that a certain suit had been brought by the said parties of the second part, in the name of the said Stinson, against the said party of the first part, in the division court at Whitby—and it was agreed by the said parties in the said deed to refer as well the said differences and suits as all actions, disputes, and matters in difference whatsoever between them, the said parties, to the award, order, and final determination of the said John Tweedie and Daniel Lamon, and such third person as they should appoint before proceeding with the reference, so as the said arbitrators, or any two of them, should make and publish their award in writing, and signed by them or a majority of them, of and concerning the matters referred to them, ready to be delivered to the said parties, or either of them, on or before the first day of February then next, or on or before any other day to which the said arbitrators should by any writing signed by them, and endorsed on the said deed, from time to time enlarge the time for making the said award; and it was by the said deed further agreed that the costs of the said action should abide the event, and that the costs of the said reference should be in the discretion of the said arbitrators, or a majority of them, and that the said arbitrators, or a majority of them, should be at liberty to order and determine what they should think fit to be done by either of the parties respecting the matters referred.

The declaration then alleged that the reference in the deed mentioned, and therein set forth, was the reference mentioned and referred to in the said condition of the defendants' bond; and it was alleged further, that after the making of the said deed and the said bond, and before the said first day of February, the said John Tweedie and Daniel Lamon took upon themselves the burthen of the said reference, and before proceeding therewith duly appointed one William Sinclair to be the said third person or arbitrator in

the said agreement mentioned and provided for, and the said John Tweedie, Daniel Lamon, and William Sinclair, after such last-mentioned appointment, and before the said first day of February, took upon themselves the said reference.

The plaintiff then set out the finding of the said arbitrators on the several matters referred to them.

As to the first cause of dispute alleged to be referred, they alleged that the said arbitrators made their award that neither the defendant John Martin nor the plaintiffs, nor either of them, had sustained any damage or loss by non-performance of the stipulations, covenants, or agreements, contained in the indenture of lease; and that for the surrender of the said lease by the plaintiffs to the said John Martin the plaintiff Stinson was entitled to recover from the said Martin the sum of \$200; but that, inasmuch as Helliwell had already received a sum of money therefor, he was not entitled to receive anything further—the said sum of £50 to be paid forthwith to the said Stinson for and on account of such surrender by the said defendant Martin; and the said arbitrators did by their award order and determine that prior to such surrender no forfeiture of the said lease by the said Stinson or the said John Helliwell had occurred.

As to the second matter referred by the agreement to the arbitrators, it was a personal matter between the plaintiff Stinson and the defendant Martin, as to the amount of damages which Stinson was entitled to recover from Martin for having wrongfully and improperly caused and procured a warrant to be issued, upon which he was arrested on a charge of larceny; and for this matter the arbitrators awarded a sum of £50, to be paid forthwith by Martin to Stinson.

The third item of the award, as declared on, was in reference to the replevin suit for certain goods and chattels, brought by the defendant against the plaintiffs, in which suit the arbitrators decided that the defendant Martin was not entitled to the possession of the goods, and not entitled to recover, and they awarded to the plaintiff Stinson the sum of one shilling for damages sustained by reason of such replevin, to be paid forthwith.

The fourth item of the award, as set out in the declaration, was the finding by the said arbitrators of a sum of \$110 in favour of the plaintiff Stinson, to be paid forthwith by Martin, for his, Stinson's, share or portion of the produce of the said land and premises, and of the goods and chattels demised in and by the indenture of lease between the said parties, which said share or part had then already been taken possession of by the said defendant.

The fifth item of the award, as stated in the declaration, was in favour of the defendant, declaring that Edward Stinson was not entitled to recover in the division court suit at Whitby; and that beyond the sums thereinbefore awarded to the said Edward Stinson he was not entitled to receive any further sum from the said John Martin on account of the said matters in difference so referred to the arbitrators, and that the said John Martin was not entitled to have, receive, or recover anything from the said Stinson; and that the said John Helliwell was not entitled to receive anything from the said John Martin, or the said John Martin from him, for or on account of the said matters in difference so referred to the said arbitrators.

The last part of the award set out was that two-thirds of the costs of the reference should be paid by the defendant Martin, and one-third by Stinson, and that if either of them should pay the whole thereof he should be entitled to recover from the other his proper portion. The declaration then assigned five breaches of the condition, by the non-payment 1. Of the \$200. 2. Of the \$50. 3. Of the \$110. 4. Of two-thirds of the costs, the plaintiff Stinson having paid the whole.

To this declaration the defendants demurred, alleging that it was bad in substance for a great variety of reasons, which were set out at length, the first being that it does not appear that Daniel Lamon, one of the arbitrators, ever had any opportunity of hearing the evidence on the said reference, or of discussing the same with the other arbitrators, or of joining in or dissenting from the award, or that he ever did in fact declare his dissent therefrom or withdraw from the said reference.

2. That it appears from the declaration, which purports to set out the award in detail, that the award is not final, (and is therefore void,) for that it does not sufficiently decide the action of replevin therein referred to, because, though it declares that the plaintiff therein, Martin, was not at the time of the commencement of the action entitled to the possession of the goods, nor to recover in the said action, it does not direct whether a nonsuit or verdict for defendants shall be entered, or how otherwise the action is to be determined; or what is to be done with the goods replevied, whether Martin is to return the same or to retain them; nor does it appear why or for what the damages were assessed, whether, if it was a distress for rent, such damages were the value of the goods distrained, and it was intended that the said John Martin should retain such goods, and the defendants in replevin have judgment for the value thereof in lieu of a return, according to the statute, or for what other reason; and also that the said award improperly directs the said damages to be paid to the said Edward Stinson alone, whereas the action of replevin appears to have been brought against the plaintiffs jointly; and as the reference gives no power to the arbitrators to decide the rights and liabilities as between such plaintiffs, the arbitrators have in that respect exceeded their authority; and although the award finds that the said Martin was not entitled to the possession of such goods at the time of the commencement of the replevin suit, yet it does not declare that he was not so entitled at the time of the reference, which is one of the matters submitted, or at the time of the making of the award; and as it is not declared that the now plaintiffs were entitled to the possession thereof, and as no direction is given as to the return or possession of such goods, the inference is that the said Martin was and is so entitled, but the said award is in that respect uncertain and ambiguous.

3. That the award is also not final, inasmuch as it appears from the submission stated in the declaration that one of the matters referred thereby was the right of possession of certain goods and chattels (besides those in question in the replevin suit) then on the said farm, yet the arbitrators have not awarded as to the right to the possession of such last-

mentioned goods, but have wholly omitted to decide that question.

4. That the arbitrators have not pursued the submission, but have exceeded their authority, in this, that the first matter referred was as to the damages which the now defendant Martin or the plaintiffs had respectively sustained by reason of the breach of any of the covenants contained in the lease, leaving it to the arbitrators merely to assess such damages, but the arbitrators have, contrary to law, awarded that no damages were sustained.

5. The said arbitrators have also exceeded their authority, in directing that the sum of \$200, which they awarded for a surrender of the lease by the plaintiff, should be paid over to the plaintiff Stinson alone, as the plaintiff Helliwell appears to have had the same legal right and estate under the lease as the plaintiff Stinson, and the submission gives the arbitrators no power to settle and decide upon the mutual rights and liabilities of the plaintiffs as between themselves.

6. That the award is not final, and is illegal, in directing the defendant Martin to pay the said sum of \$200 for the surrender of the said lease, without directing the plaintiffs to surrender the same, and give up possession of the land, thus rendering future proceedings in equity or otherwise necessary to enable the said Martin to obtain such surrender and possession; or if he could not obtain the same, then the said sum of \$200 appears to be awarded without any consideration whatever.

7. That it appears on the face of the award that the arbitrators have mistaken the law, and the award is illegal, in directing payment of \$50 damages by the defendant Martin, for causing a warrant therein referred to to be issued against the plaintiff Stinson on a charge of larceny, without shewing that the prosecution was yet ended by the dismissal of the complaint, or the acquittal of the defendant; and it does not appear that the said charge has yet been investigated, or if committed for trial whether the trial has yet taken place, or the proceedings terminated in any way, and it is not even stated that the defendant Martin caused Stinson to be arrested, but only that he caused the warrant to be issued,

nor does it appear that the said Martin, in so causing the issue of the said warrant, acted maliciously and without reasonable and probable cause.

8. That the arbitrators have exceeded their authority, in fixing the amount of the costs of the reference, and also in directing that such costs in a certain event should be paid to the said Edward Stinson alone, without providing for the costs of the said Helliwell.

9. That it does not appear by the award that there were no other matters in difference between the parties.

The defendant McPherson demurred to the second breach assigned in the declaration, as bad in substance, on the ground that though the award be good he was not liable to the payment of the money referred to in the second breach, as it appeared from the bond declared on that he, McPherson, was only liable for the performance of any award made under the reference as between the plaintiffs jointly and the defendant Martin, whereas the \$50 referred to in the said second breach was awarded under that portion of the reference between the plaintiff Stinson alone and the defendant Martin, for which he, McPherson, did not undertake to be liable.

The defendants also pleaded to the declaration, that the agreement of reference mentioned in the declaration referred the matters in dispute therein specially recited, and all the matters in difference whatever between the parties, to the award of the said arbitrators, the said matters so specially referred and the terms of the agreement of reference being set out in the declaration, and recited in the award hereinafter set forth. They then set out the award at length, (being substantially the same as stated in the declaration,) and alleged that it was the only award made, and that it was void on the face of it, in not deciding all the matters submitted, in not being final, and in that the arbitrators had exceeded their authority.

To this plea the plaintiffs demurred, on the grounds that the plea admitted the making of the bond, and shewed no performance of the condition or payment of the moneys awarded to

be paid, nor any excuse for non-payment: that the award set out in the plea was good and valid: that the award set out in the plea was exactly the same in effect as set out in the declaration, and all the other facts set out in the plea were the same facts as were set out in the declaration; and the said plea was useless, and only burthened the record, and the inferences or matters of law in the concluding part of the plea should have been alleged and were already substantially alleged in the preceding demurrer of the defendants to the declaration: that the plea shewed no answer to the declaration.

There was another suit of *Stinson v. McKay*, in which the pleadings were the same as in this case, except as regarded the defendant *McPherson*, and both cases were argued at the same time.

*Robert A. Harrison*, for the defendants in *Stinson et al. v. Martin et al.*, cited *Finkle v. Arnold*, 6 U. C. R. 168; *Gisborne v. Hart*, 5 M. & W. 50; *Dresser v. Stansfield*, 14 M. & W. 822; *Adcock v. Wood*, 6 Ex. 18; *Hodgson v. The Municipality of Whitby*, 17 U. C. R. 230; *Sloan v. Halden*, 14 U. C. R. 496; *In re McDonald and Presant*, 16 U. C. R. 84; *Helps v. Roblin*, 6 C. P. 52; *Bhear v. Harradine*, 7 Ex. 269; *Wild v. Holt*, 9 M. & W. 161; *Hewitt v. Hewitt*, 1 Q. B. 110; *The Corporation of Northumberland and Durham and The Corporation of Cobourg*, 20 U. C. R. 283; *Rainforth v. Hamer*, 25 L. T. Rep. 247; *Russell on Awards*, 284; *Benedict v. Parks*, 1 C. P. 370; *Wood v. The Copper Miners' Co.*, 14 C. B. 428; *Sim v. Edmands*, 15 C. B. 240; *Kepp v. Wiggett*, 6 C. B. 280; *In re Coombs and Fernley*, 4 Ex. 839; *Fisher v. Pimbley*, 11 East 188.

*Cochrane*, for the defendant in *Stinson v. McKay*, cited *Russell on Awards*, 250, 251, 255, 278, 651, 653; *In re Tribe and Upperton*, 3 A. & E. 295; *Doe dem. Madkins v. Horner*, 8 A. & E. 235; *Winter v. Munton*, 2 Moore 723; *Auriol v. Smith*, 1 Turn. & Russ. 128.

*Richards*, Q.C., for the plaintiffs in both cases, cited *Russell on Awards*, 266, 267, 269, 271, 290, 339, 371, 372.

McLEAN, C. J., delivered the judgment of the court.

This action is on a bond of the defendants, which is not in any way denied, and the condition of it is, that if John Martin should well and truly pay, perform, and keep any award that might be made by the arbitrators, or a majority of them, and which by the terms of such award should be directed to be paid or performed by the said John Martin, then the bond to be void.

The payment of all moneys awarded, no matter to whom, so that the award relates to a matter in difference between the parties which was submitted to the arbitrators, is secured by the bond, and the defendant McPherson is wrong in supposing that he is not answerable for the amount awarded to Stinson alone for what is admitted in the deed of submission to have been wrongfully and improperly causing and procuring a certain warrant to be issued, and arresting Stinson thereon on a charge of stealing.

The several causes of difference agreed to be referred are stated in the declaration, and they are not denied, and the wrongful arrest of Stinson on a warrant procured or caused to be issued by Martin is one of them. The arbitrators have considered that cause of difference, and have decided, and it is no ground of objection on the part of the defendant McPherson that it was a matter in which the other plaintiff, Helliwell, was not interested. It is evident on the face of the submission that that particular cause of difference was between Stinson alone and Martin, and the defendant McPherson by his bond with Martin has become bound for the payment of the amount awarded in that case as any other. The plaintiffs are entitled to judgment on the demurrer filed by defendant McPherson to the second breach of the bond assigned in the declaration.

Then as to the demurrer filed by the defendants jointly, and the grounds stated in support of it, I have carefully examined the award, and I confess that I have been unable to find the slightest variance between it and the submission, or that the arbitrators have either exceeded their authority or failed to dispose of the several matters referred to them.

Amongst the various objections urged at such great length,

though I think with little force or propriety, against the award, is that it is not final because the arbitrators have not declared what was to be done with certain goods and chattels for which the replevin suit was brought, and because no award whatever is made relative to the possession of certain other goods and chattels which were on the farm. Now the matter referred to the arbitrators as to the first-mentioned goods and chattels was the right of possession, and the damages of the parties by reason of the suit in replevin, and on these points the arbitrators have awarded that the defendant Martin was not entitled to the possession of the goods, and not entitled to recover in the suit, and they award to the plaintiff 1s. for damage sustained by reason of such suit. That finding disposes fully and clearly of the matters submitted, and had the arbitrators taken upon themselves to say anything as to the return of the goods or the judgment to be entered in the replevin suit, they might with much more propriety be objected to as having exceeded their authority.

Then as to the other goods and chattels on the farm, the possession of which was a matter in difference which was submitted, the arbitrators have decided that the defendant Martin shall pay \$110 to the plaintiff Stinson for his share or portion of the produce of the land and premises, and of the *goods and chattels demised by the indenture of lease*, which said share or part had been taken possession of by the defendant. A certain consideration is ordered to be paid by the defendant to the plaintiff Stinson, there being no forfeiture of the lease, for the surrender by the plaintiffs to the defendant of the lease, and the term which the plaintiffs were entitled to hold under it. The £50 is directed to be paid to Stinson because the other plaintiff, Helliwell, had already been paid for the surrender of his interest. When the arbitrators were awarding a total surrender of the lease, and of all that had been demised by the defendant to the plaintiff, they probably did not think it important to award as to the right of possession of goods and chattels on the farm which formed part of what had been demised, but they have awarded a sum of money for the share of produce on the farm, belonging to Stinson, and the surrender of the

goods and chattels demised by the lease, all of which had been taken possession of by the defendant, thus virtually deciding that the defendant for the consideration stated should be entitled to retain as well the produce as the goods and chattels demised, of which he had so possessed himself.

The points intended to be put in issue by the defendants' plea are all matters of law brought in question by their previous demurrer to the declaration, and cannot again be put in issue as matters of fact. The award has in fact decided all matters submitted; it is final as to all those matters, and there is no excess of authority on the part of the arbitrators. All the matters are disposed of by the decision of the joint demurrer.

The plaintiffs are entitled to judgment on the demurrer filed by the defendants, and also on the demurrer to the defendants' plea, with costs.

Judgment for plaintiffs on demurrer.

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During this term the following gentlemen were called to the bar: GEORGE CARR SHAW, JAMES ALEXANDER McGLASHAN, JAMES BENSON, CHARLES ROBERT HORNE, JAMES FREDERICK SMITH, Junr., DONALD McLENNAN, EDWARD PENTON, BRITTON BATH OSLER, JAMES FLETCHER CROSS, ASHTON FLETCHER, JOSEPH JOHN CURRAN, ROBERT SULLIVAN, JAMES KIRKPATRICK KERR, JOHN JAMES BLEECKER FLINT, WILLIAM HAMILTON JONES.

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## RULE OF COURT.

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The following rule was read in court:—

*Trinity Term, 26 Victoria.*

IN THE { QUEEN'S BENCH.  
COMMON PLEAS.

It is ordered that in appeals from the county courts, in all cases when the bond required by the sixty-seventh and sixty-eighth sections of the "County Courts Act" is executed, perfected, and produced to the judge of the county court, whose decision is appealed from, as required by the said statute, on or before the first day of the term of the court appealed to next after the date of such bond, the case appealed shall be set down to be heard on the first or second paper day of such term; and that if the case be not so set down the appeal shall be considered and treated as abandoned, and the party in whose favour the decision of the court below has been pronounced shall be at liberty to proceed in the cause as if no proceeding to appeal the same had been taken.

(Signed,)	A. McLEAN, <i>C. J.</i>
„	ROBT. E. BURNS, <i>J.</i>
„	JOHN H. HAGARTY, <i>J.</i>
„	W. H. DRAPER, <i>C. J. C. P.</i>
„	WM. B. RICHARDS, <i>J.</i>
„	JOS. C. MORRISON, <i>J.</i>

MICHAELMAS TERM, 26 VICTORIA, 1862.

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*Present :*

The Hon. ARCHIBALD McLEAN, C. J.

„ JOHN HAWKINS HAGARTY, J.(a)

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ECCLES ET AL., EXECUTORS OF HUGH ECCLES, v. PATERSON  
AND HOLE.

*Ejectment—Proof of title.*

In ejectment against two defendants the plaintiffs proved a mortgage in fee made by one while he was in possession as owner, and duly assigned to them, and that the other defendant came in after, without shewing how. *Held*, sufficient, *prima facie*, to entitle the plaintiffs to a verdict against both.

EJECTMENT.—The plaintiffs proved a mortgage in fee from defendant Paterson, duly assigned to their testator.

At the trial, at Toronto, before *Morrison*, J., one James Paterson, the son of the defendant, swore that he knew the lot: that his father (the defendant) was in possession as owner when the mortgage was made. The defendant Hole, he said, went into possession after, he did not know how; his father was not in possession at the time of the trial.

It was objected that there was no evidence to entitle the plaintiffs to recover possession. This the learned judge overruled, holding that a *prima facie* case had been made out, and there was a verdict for the plaintiffs.

*Robert A. Harrison* moved for a new trial as regarded Hole, for misdirection, citing *Doe Wilkes v. Babcock*, (1 C. P. 392,) and *Doe Crew v. Clarke*, Rob. & Har. Dig. "Title" 14.

HAGARTY, J., delivered the judgment of the court.

The latter case is not, we think, applicable. There may be some expressions in the former case that give colour to

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(a) Mr. Justice Burns was absent during this term, owing to indisposition.

the application, but on the plaintiffs' own evidence there the title was clearly shewn to be in the Crown, and defendant could not be assumed to be a wrong-doer. In fact the plaintiff shewed that he himself had not title as against defendant.

We have always understood it to be the rule, and a most wise and salutary rule it is, to hold such evidence as was given in this case to be sufficient *prima facie*, and that in the absence of any contradictory proof from defendant, to direct a jury in favour of the plaintiff.

A man in full possession, claiming to be owner, makes a deed in fee to one through whom the plaintiffs claim. After this time another gets into possession in some unexplained manner, and to a process in ejectment the mortgagor and this person appear and defend.

We think the latter may be described in the words of *Bramwell*, B., in *Davison v. Gent*, (1 H. & N. 748): "The defendant" (there were two) "is in this dilemma: either his entry was altogether tortious, or he came in under the tenant, and is therefore estopped from denying the plaintiff's title."

We also refer to *Doe Hughes v. Dyeball* (M. & M. 346); *Hogg v. Norris* (2 Fos. & Finl. 246); *Bikker v. Beeston* (1 Fos. & Finl. 685); *Homes v. Pearce* (Ib. 283).

As Sir W. Erle remarks in one of these cases, if defendant Hole had any title he could easily have offered proof of it. We think there should be no rule.

Rule refused.

### MILLS v. WIGLE.

#### *Covenant for title—Burden of proof.*

Where the plaintiff sues upon a covenant for right to convey land, alleging as a breach that defendant had no such right, and defendant pleads that he had, the proof of title lies upon defendant.

ACTION on a covenant contained in a conveyance of certain land by defendant to plaintiff, that defendant had the right to convey the said land to the plaintiff, alleging as a breach that he had not the right to convey the said land, nor any title thereto.

*Plea*, that defendant had the right to convey the said land, according to the effect, true intent and meaning of the said deed.

The case was tried at Sandwich before *Connor*, Q. C., acting for the learned Chief Justice of this court under Consol. Stats. U. C., ch. 11. The price of the land and interest was admitted.

The learned Queen's Counsel ruled that the proof of the issue as to title was on the defendant, the defendant objecting, and leave to move to enter a nonsuit was reserved.

*O'Connor*, for the defendant, moved last term, and also raised the point as to the measure of damages, urging that the plaintiff could only recover nominal damages, as no eviction or damage was shewn. He moved also on affidavits, stating that at a future trial he would be prepared to prove his title good, and shewing the evidence thereof. He cited *Rawle on Covenants for Title*, 73-80; *Graham v. Baker*, 10 C. P. 426; *Scriver v. Myers*, 9 C. P. 255; *McCollum v. Davis*, 8 U. C. R. 150.

*Becher*, Q. C., shewed cause, and cited *McKinnon v. Burrows*, 3 O. S. 114; *Lemesurier v. Willard*, 3 U. C. R. 285.

McLEAN, C. J.—The defendant, I think, should have a new trial in this case, but upon his affidavits only, and on payment of costs.

HAGARTY, J.—It would appear to be the practice adopted in this country, in the cases cited, that in a case like this, the affirmative of the issue as to title is on the defendant; therefore the motion for nonsuit fails.

The point as to measure of damages does not appear from the judge's notes to have been raised at the trial, and I should be sorry to have it pressed to a decision without a full knowledge of the facts. I think, however, there should be a new trial if the defendant desire it, on his affidavits, on payment of costs.

IN RE McNAB, CLERK OF THE PEACE FOR THE UNITED  
COUNTIES OF YORK AND PEEL, AND DALY, CLERK OF THE  
COUNCIL OF THE CITY OF TORONTO.

*Jury law.*

The court refused a mandamus to the clerk of the council of the city of Toronto to deposit with the clerk of the peace for the united counties of York and Peel the duplicate report of the selectors of jurors for the city liable to serve during 1863 for the counties, for

*Semble*, that under the Jury Act, the Municipal Act, and the act separating the city from the counties, the duty of selecting and drafting jurors for the city now belongs to the clerk of the recorder's court, and not to the clerk of the peace for the counties.

*Dalton* obtained a rule to shew cause why Charles Daly, clerk of the council of the city of Toronto, should not be ordered by mandamus to deposit forthwith with the clerk of the peace of the united counties of York and Peel the duplicate report of the selectors of jurors for the city of Toronto liable to serve during the year 1863.

*Cameron*, Q. C., shewed cause.

The statutes referred to are noticed in the judgment.

HAGARTY, J., delivered the judgment of the court.

Before the act of 1861, erecting the city of Toronto into a separate county, it would seem that under the Jury Act, Consol. Stats. U. C., ch. 31, secs. 14, 24, the original jury selectors would make out their lists for the city, and by the 15th of September deposit one copy with the clerk of the peace for the county within which the city is included, and another with the city clerk.

Secs. 25 and 26. The clerk of the peace makes out "The Jurors' Book," entering names alphabetically, and (sec. 27) dividing them into four rolls. 1. Grand jurors, superior courts. 2. Grand jurors, inferior courts. 3. Petit jurors, superior courts. 4. Petit jurors, inferior courts.

Sec. 39. In open court of quarter sessions next after the 10th of November, in each year, he is to present the same and swear to it as correct.

Sec. 51. Selectors are named, all being county officers.

Sec. 52. Proclamation made for silence "while the names of persons to serve as jurors for the next year for such county or union of counties (and city, if there is one having a re-

corder's court established therein within the limits of such county or union of counties,) are openly selected from the jurors' rolls."

Sec. 53, sub-sec. 9. The clerk of the peace shall make out "the grand jury list for the superior courts."

Sec. 54. In like manner "the grand jury list for inferior courts," and (sec. 55) petit jurors for superior and inferior courts.

The sheriff therefrom, on his precept, summons the jurors.

Secs. 65 and 66. Directions as to precept, to apply to assize and *nisi prius*, quarter sessions, county courts, and recorders' courts.

Sec. 78. The sheriff is publicly to draft the panel in presence of the clerk of the peace and any two justices, and the panel shall be attested by said clerk and justices, or any two of them.

Sec. 113. Special jurors are to be struck at the office of the clerk of the peace.

Sec. 132, sub-sec. 1. The clerk of the recorder's court, within the period mentioned for the performance of similar duty by the clerks of the peace, and in a similar manner, shall prepare from such reports of the selectors of jurors of the county, within the limits of which the city is, as have been returned for wards or other local divisions lying within such city, a *jurors' book for such city*, inserting in the respective jurors' rolls in such book the names of those in the city returned as qualified to serve as grand or petit jurors respectively, either in the superior or inferior courts.

Sub-sec. 2. He shall make only two rolls, one for those selected, balloted, and reported for grand jurors in the superior or inferior courts, the other for the like petit jurors in superior or inferior courts.

Sub-sec. 3. The recorder's court, the recorder, mayor, clerk, and high bailiff, shall perform the like duties in respect of such books, and the preparing and selecting of the jury lists from the jurors' rolls, as are prescribed to the selectors of jurors for the respective counties.

Sub-sec. 4. All duties prescribed for sheriffs shall be per-

formed by high bailiffs as to grand and petit jurors for the courts of any such cities.

Sub-sec. 5. The manner of drafting, striking, and summoning juries by the sheriff on writs of *Ven. Fac. Jur.*, as prescribed by this act, shall be observed and followed by the high bailiff, coroners, elisors, and other officers having the return of jury process within such city, and such officers shall have free access to the jurors' book in the office of the recorder's court or other similar office of such city.

Sub-sec. 6. And they shall possess the same powers and perform the same duties as to drafting, striking, returning, and summoning such jurors as the sheriffs can on similar processes.

Secs. 133, 4, 5, 6. In newly proclaimed cities there shall be a jurors' book, which the clerk of the peace shall make out and give to the clerk of the recorder's court.

Sec. 137. All powers given to justices are vested in aldermen.

Sec. 160. Provides a tariff of fees, which are the same for clerks of the peace and of recorder's courts, making no distinction either as to services or charges.

The Municipal Act, Consol. Stats. U. C., ch. 54, sec. 370, establishes recorder's courts.

Sec. 376. The city clerk or other person appointed by the council shall be clerk of the recorder's court, "*and shall perform the same duties and receive the same emoluments as clerks of the peace.*"

Sec. 379. The high bailiff of a city, *not made a separate county for all purposes*, shall ballot for and summon the jurors under a precept signed by the recorder or mayor, or the aldermen elected to act in the recorder's place, in manner appointed by the laws relating to jurors.

We thus have the law as it stood before the final act of separation, and its tendency seems clearly to be to make everything as distinct as to jurors in the city as was possible while the final links remained unbroken.

We now turn to the 24 Vict., ch. 53, the Separating Act. Separate sittings are directed for all the courts, and a distinct venue is provided for the city.

Sec. 5. "The jurors shall be selected and summoned for the united counties and for the city respectively, as for different counties."

Sec. 8. The city shall be deemed a county for all matters and purposes in the act mentioned connected with the administration of justice.

A difficulty arises from the very peculiar wording of clause 9: "The judicial and executive functionaries, and all other officers connected with the administration of justice in the city, shall be the judicial and executive functionaries and officers discharging the like offices and duties in the united counties."

It should be read, we think, in connection with, and as it were by the light of, the next section, 10: "All judicial and executive officers, acting and appointed both for the city and the united counties, shall be styled, and shall continue to be as hitherto, officers of the united counties of York and Peel:" declaring then that the sheriff of York and Peel shall be sheriff of the city of Toronto, and as such sheriff shall have and exercise in the city in respect of the same, and of the gaol therein, and in all other respects, the same rights, &c., as are exercised by the sheriff of the counties.

As we read this act, we cannot see that it was the intention of the Legislature to continue any connection between the old counties of York and Peel and the new county of the city. The sheriff is left expressly, and the status of no other officer is defined; and reading together the Jury Act, the Municipal Act, and the Separating Act, we can hardly see either any reason for, or any intention of continuing to the clerk of the peace for the counties any interference with the selecting or drafting of jurors in a municipality and county so completely separated as the city.

The construction sought to be placed by the applicant on the ambiguous ninth section is, we think, altogether too wide in its operation. We hardly profess to attach any positive meaning to the words. The intention of the framer of the clause may possibly have been exactly the opposite to what is contended by the applicant. It may have been that the functionaries and officers connected with the adminis-

tration of justice in the city should exist as or occupy positions like similar officers in the counties. The clause immediately following may be read as protective of such officers as at the passing of the act were acting both for city and counties, allowing them to retain their positions in the counties, but specially providing for the retention of the Sheriff as sheriff of the newly-created county of the city.

We cannot see our way clearly to an interference by mandamus.

Difficulties may easily be suggested in the details of working the Jury Act with the clerk of the recorder's court always filling the place of the clerk of the peace; but to our minds the difficulties of adopting the applicant's view, and continuing the clerk of the peace in his old position with the city jury lists and panels appear to be much greater.

If the work must be all done without his intervention, we have still the old method of selection and deposit of rolls with the city clerk.

The making out of a jury book may be by the clerk of the recorder's court, and by sub-sec. 3 of sec. 132 already quoted, it would seem as if at the recorder's court the same selection of the jury lists from the rolls can be made, and the other sub-sections make general provisions calculated to meet most cases that arise.

The Municipal Act expressly declares that the clerk of the recorder's court shall perform the same duties and receive the same emoluments as the clerk of the peace; and finally, when we find the Separating Act declaring that the city jurors shall be selected and summoned as for a different county, it requires far clearer language than we find used by the Legislature to induce us to concur in ordering the clerk of the peace for York and Peel to be still held to perform his old duties in a county distinct from his own.

We find the city declared a county. We find it with a recorder's court analogous to the quarter sessions, and with a clerk of that court directed to perform the same duties and receive the same emoluments as the clerk of the peace. We find machinery for working the jury law similar to, if not precisely identical with, that provided for the coun-

ties, and then a declaration from the Legislature that the selection and summoning of jurors shall be in the city as in a different county.

We are not wholly free from doubt, and we trust in a matter of such great importance the doubt will at the earliest moment be removed by Parliament.

Perhaps the parties before us, as we understand the contest to be amicably conducted, may manage by some double concerted action to prevent any difficulties arising between the present time and the next session of Parliament.

We cannot pretend to reconcile all we find in the three statutes, but we have found sufficient to convince us that we cannot arrive at any other conclusion than to discharge the rule asking for a mandamus.

Rule discharged.

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### MCCOLLUM V. MCKINNON.

*Reference—Subsequent proceeding in the suit.*

Where a cause and all matters in difference had been referred, and an award made : *Held*, that all questions of law as well as fact were thereby submitted to the arbitrators : that a demurrer afterwards set down for argument must therefore be struck out of the paper ; and that objections to the award as bad upon its face could not be raised as giving a right thus to proceed with the action.

DURING last Trinity Term *Robert A. Harrison* obtained a rule to shew cause why the demurrers set down by the plaintiff should not be struck out of the paper, on the ground that the cause was no longer in court, having been by consent of parties referred to arbitration, and an award made. He moved on an affidavit of defendant's attorney, that after a verdict for the plaintiff on the issues in fact the cause and all matters in difference had been referred, and filed a copy of the submission and of the award.

During last Michaelmas Term *M. C. Cameron* shewed cause, urging that the award was bad on its face, and therefore no bar to proceeding with the cause. He cited *Nicholls v. Jones*, 6 Ex. 273 ; *Morgan v. Smith*, 9 M. & W. 427 ; *Angus v. Redford*, 11 M. & W. 69 ; *Crump v. Adney*, 1 Cr. & M. 355 ; *Ross v. Clifton*, 9 Dowl. 356 ; *Stonehewer v. Farrar*, 6 Q. B. 730 ; *Grenfell v. Edgecome*, 7 Q. B. 661 ; *In re Ryder*, 3 Bing. N. C. 874.

*Robert A. Harrison, contra*, urged that the award could not be impeached in this indirect manner: that it was *prima facie* sufficient, and disposed finally of the suit. He cited *Mathew v. Davis*, 1 Dowl. N. S. 679; *Doe Stimpson v. Emmerson*, 9 L. T. Rep. 199; *Russell on Awards*, 2d Ed. 121-2, 703.

HAGARTY, J., delivered the judgment of the court.

No authority has been cited to us in support of the proposition that in answer to a motion of this description the sufficiency of the award can be fully discussed, and that if any defect be shewn the suit should proceed in the ordinary manner.

Except under the force of a direct authority we think we should not accede to this view. If the point be new we should hesitate to establish a precedent attended, we think, with many inconveniences, one of which may be suggested, namely, that a judgment so obtained against an award would deprive the opposite party of the benefit of having the award sent back to the referees to make good a defect or omission: and again, that on a motion to strike out a demurrer he can be met by a string of objections to an award existing in fact, in a case long since taken out of court either by rule of reference or submission by bond or agreement containing the usual clause for making it a rule of court.

We are not prepared to say that there might not be a case where the alleged award was so transparently a nullity that it might not possibly be treated as such.

We do not think we are called on here to express any opinion on the objections urged to the award, nor shall we do so; but we have read all the authorities cited by the plaintiff's counsel, and reading the submission and award together we hardly yet understand the alleged defects.

The submission provides for the settlement of several matters pending and in dispute, and the award would seem fairly and intelligibly to meet each case. At least it strikes us that any two men respectively directed to perform the things mentioned in this award, and willing in good faith to carry out its provisions, could have no difficulty whatever in doing so.

We of course know nothing of the merits of the controversy, or the fairness or unfairness of the settlement directed by the arbitrators, but it appears to us that it would not be just towards either of the parties relying thereupon to lend any aid towards impeaching it, except in the usual manner allowed by law.

We think the reference of the cause and all matters in difference threw the settlement of all matters of law as well as of fact into the hands of the arbitrators.

Rule absolute.

### SHAVER V. LINTON.

*Medical practitioners—Right to practise in U. C. under diploma from L. C.  
—Slander—Libel—Privileged communication.*

A medical practitioner duly licensed in either section of the province may practise in the other without a fresh license.

*Held*, therefore, that the plaintiff, who had a diploma from Lower Canada, was entitled to practise in the Upper Province, subject to any local laws affecting the profession there.

Defendant, being clerk of the peace, in a conversation with the sheriff as to the medical examination of a lunatic in gaol, said he would not employ the plaintiff, as he had not the Governor's license, adding that he thought the sheriff had more pluck than to ask him, after what he, the defendant, had written (referring to some article in a medical journal). On being applied to by one M. on the plaintiff's behalf for an apology, he repeated that defendant was not a qualified physician in Upper Canada, and could not legally practise here without the Governor's license. *Held*, that both conversations were privileged, and that there being no evidence in either, and no extrinsic evidence, of malice, there was nothing to leave to the jury.

The defendant also published a letter addressed to the editor of a public paper, in which he stated that the plaintiff was unlicensed. *Held*, that the learned judge might either have ruled this to be privileged, or at all events have left it to the jury with strong caution as to the usual liberty of discussion allowed in all matters of public interest, and with observations somewhat like those in the charge in *Turnbull v. Bird*, 2 F. & F. 508.

#### SLANDER and libel.

First count.—Slander of the plaintiff as a physician and surgeon. "He is not a qualified physician in Upper Canada, and cannot legally practise here without the Governor's license."

Second count.—Words to the same effect. Third count.—Libel, in a letter printed, addressed to the editor of a public journal in Lower Canada, the words complained of being :

"He (the plaintiff) was simply unlicensed according to the laws of Upper Canada."

*Pleas.*—Not guilty to each count; and also, to each count, that the plaintiff was not a physician or surgeon according to the laws of Upper Canada. And to the second count, that the words were spoken to the sheriff by the defendant, as clerk of the peace, respecting a lunatic prisoner, and were privileged.

At the trial, at Stratford, before *Richards, J.*, the plaintiff called *J. McCulloch*, who proved that he went to defendant to ask him to apologise for charging the plaintiff with practising without a license, and told him that without an apology the plaintiff would consider his words malicious; defendant said several times, "He is not a qualified physician in Upper Canada, and cannot legally practise here without the Governor's license."

*Mr. Modervell*, the sheriff, proved that he spoke to defendant, who was clerk of the peace, respecting the removal of a lunatic in gaol; and on his suggesting to defendant the name of the plaintiff as an examining physician, defendant said that he had not the Governor's license, and he would not employ him after what had occurred, adding, "He thought I had more pluck than to ask him after what he had written," (referring to some article in a medical journal.) The plaintiff had been gaol physician, and frequently had examined lunatics.

*J. M. Robb*, postmaster, proved that a good many of the handbills or extras produced (which were reprints of the letter complained of) had come through the post office, and the postage had been charged to the defendant.

It was admitted that the plaintiff had a diploma from Lower Canada.

*J. Wilson, Q. C.*, for defendant, objected that this did not authorise the plaintiff to practise without a license from the Governor. The learned judge ruled otherwise. It was then further objected that it was not shewn that the acts, or any of them, were done maliciously. The learned judge said that must be left to the jury.

The jury were asked to say, first, if the words charged

were spoken of the plaintiff in his professional character. Secondly, whether they were satisfied, if spoken, they were calculated to injure him professionally; also, if they were spoken maliciously, and with the intent alleged.

The jury found for the plaintiff, and 5s. damages.

*Adam Crooks* obtained a rule to shew cause why there should not be a new trial on the ground of misdirection as to the plaintiff's qualification, also that the acts done were privileged, and no malice was to be inferred therefrom. He cited the different statutes which are referred to in the judgment: *Croft v. Stevens*, 5 L. T. Rep. N. S. 683; *Tuson v. Evans*, 12 A. & E. 733; *Dixon v. Parsons*, 1 F. & F. 24; *Turnbull v. Bird*, 2 F. & F. 508; *Humphreys v. Stillwell*, 2 F. & F. 590; *Maitland v. Bramwell*, 2 F. & F. 628; *George v. Goddard*, 2 F. & F. 689; *Harrison v. Bush*, 5 E. & B. 344, 347; *McIntyre v. McBean*, 13 U. C. R. 534.

*J. A. Carrall*, contra, cited *Cooke v. Wildes*, 5 E. & B. 328; *Eastwood v. Holmes*, 1 F. & F. 347; *Gilpin v. Fowler*, 9 Ex. 615.

HAGARTY, J., delivered the judgment of the court.

It may be convenient first to notice the objection to the learned judge's ruling as to the plaintiff's qualification to practise.

The 4 & 5 Vict., ch. 41, immediately after the union of the provinces, reciting that it was expedient that persons authorised to practise physic or surgery in one portion of the province should be authorised to practise in the other portion thereof, enacts that any person duly licensed or authorised to practise, &c., either in Upper or Lower Canada, "under the laws in force in said portions respectively, shall be and is hereby authorised to practise in any part of the province for the purpose or purposes for which he might without this act have practised in one of the aforesaid portions of this province, but subject to the laws to which other practitioners are or shall be subject in the portions of this province in which he shall practise.

10 & 11 Vict., ch. 26, first declaring that the act just quoted should remain unaffected, created "The College of Physicians and Surgeons of Lower Canada," with a board of governors called "The Provincial Medical Board," authorised to examine and give certificate of qualification to applicants. It directs that without such certificate no person should receive a license to practise in Lower Canada; and which license the Governor of the province shall grant upon production of the certificate; and provides for granting the certificate without examination to those who had obtained a medical degree or diploma in any university or college in her Majesty's dominions; and, in section 9, that nothing therein contained should prevent any person duly licensed to practise physic or surgery in Upper Canada from practising the same in Lower Canada, according to the provisions of the act previously cited.

The 12 Vict., ch. 52, sec. 3, declares that a license from the Governor-General shall be unnecessary, but requires a license from the Provincial Medical Board, who are thereby authorised to grant such license; and by section 4 it substitutes the "license" instead of the "certificate of qualification," mentioned in the 10 & 11 Vict., ch. 26, already quoted.

Chapter 40 of the Consolidated Statutes of Upper Canada regulates the practice here. The medical board examine and certify, and by section 7 the Governor grants license. Section 10 enacts that "any person duly licensed or authorised to practise as a physician or surgeon, or as both, either in Upper or Lower Canada, may practise in any part of this province, for the purpose or purposes for which he might without this act have practised in one of the aforesaid portions of this province, but subject to the laws to which other practitioners are subject in the portion of this province in which he practises." Section 8 enacts that any person presenting a diploma from any university in her Majesty's dominions, or the Royal College of Physicians or of Surgeons, in London, or a commission or warrant as physician or surgeon in the naval or military services, may obtain the Governor's license direct.

Section 12 forbids persons (except homœopathists duly

authorised by law) not being licensed as aforesaid, or not having been heretofore licensed by any medical board, or in the naval or military service, from practising in Upper Canada, under the penalty of being guilty of a misdemeanour.

The act respecting lunatics, Consol. Stats. U. C., ch. 71, sec. 5, requires a certificate of "Three medical licentiates."

Chapter 76, Consol. Stats. C., sec. 1, has the same clause almost verbatim with sec. 10 of Consol. Stats., U. C., ch. 40.

As the law now stands, a Lower Canada physician or surgeon does not obtain or require any license from the Governor, but he obtains a license directly from the provincial medical board, as mentioned in the statute 12 Vict., ch. 52.

In Upper Canada the license to practise is only obtained from the Governor.

In our opinion, if the duly licensed practitioner either in Upper or Lower Canada chooses to move from one section of the province to the other, he requires no fresh license. From 1841 down to the Consolidated Acts of 1859 this principle or privilege seems clearly kept in view.

If defendant's view of the law be correct, the reciprocal privilege seems narrowed down to almost nothing. He insists that the Lower Canada physician must before practising in Upper Canada obtain the Governor's license, just as the Upper Canada certificated men of the Medical Board obtain it; and this he contends is proved by the saving clause, "subject to the same laws as other practitioners in the portion of the province in which he practises." We cannot agree with this very narrow construction. We think this clause simply provides that if there be any laws affecting or regulating those who practise physic or surgery in the place selected for practice, he shall be bound to conform to them: for example, if there were a local law requiring all practitioners to register their names in, or to make any returns to, any department, or to observe any sanitary or municipal regulations, or under the act respecting anatomy, then that his right to practise must be subject thereto.

By the Upper Canada Consolidated Act, already cited, there is no express provision for the Governor granting a license to any Lower Canadian licentiate, although it enumerates the different classes of persons who may obtain such license direct, without the certificate of the Medical Board; and if the Legislature intended that he must obtain such license, we think they would hardly have failed to provide for such a common case, especially as they do legislate expressly as to reciprocity between Upper and Lower Canada in such matters.

We entertain no doubt that the learned judge's ruling on this point at the trial was correct, and that the plaintiff was duly authorised to practise in Upper Canada, if provided with the diploma shewing his license from the Lower Canada Board, under the statutes already quoted.

We are of opinion that any conversation between the sheriff and the clerk of the peace respecting a medical examination of lunatics in gaol was in its nature privileged; and the conversation set out in the first count was with McCollough, who was sent by the plaintiff to ask defendant to apologise for the words spoken to the sheriff, and falls under the same protection.

We are unable to see anything in the evidence in this case to take anything said by the defendant out of the protection of that privilege.

In several cases of late years it is discussed whether the judge should stop the case before reaching the jury, on his own view of the question of privilege, or whether he should always leave it to them whether the privilege had been exceeded or not.

*Somerville v. Hawkins*, (10 C. B. 583,) takes the former view. A master charged a servant with robbing him, and when he went for his wages defendant called in two other servants and said to them: "I have dismissed that man for robbing me: do not speak to him any more, in public or private, or I shall think you as bad as him." *Wilde, C. J.*, ruled that it was a privileged communication, and that there was no evidence of malice, and that defendant was entitled to a verdict of not guilty. In term it was insisted that

he should have left the question of malice to the jury." *Maule*, J., says, delivering the judgment of the court: "We think the communication was privileged, *i.e.*, it was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used. That presumption being rebutted, it was for the plaintiff to shew affirmatively that the words were spoken maliciously; for the question being one the affirmative of which lies on the plaintiff, must, in the absence of evidence, be determined in favour of the defendant. \* \* \* The evidence, as it appears to us, does not raise any probability of malice. \* \* \* We think the Lord Chief Justice was right in not leaving the question to the jury."

This case is referred to by Lord *Campbell*, in *Harrison v. Bush*, (5 E. & B. 358,) as a leading case on privileged communications. In *Cooke v. Wildes*, (5 E. & B. 340,) Lord *Campbell* says, "We fully adhere to the doctrine laid down in *Somerville v. Hawkins*, (10 C. B. 583,) and *Taylor v. Hawkins*, (16 Q. B. 308,) that it is a matter of law for the judge to determine whether the occasion of writing or speaking criminary language, which would otherwise be actionable, repels the inference of malice, constituting what is called a *privileged communication*; and if at the close of the plaintiff's case there is no intrinsic or extrinsic evidence of malice, that it is the duty of the judge to direct a nonsuit or a verdict for the defendant, without leaving the question of malice to the jury, as a different course would be contrary to principle, and would deprive the honest transactions of business and of social intercourse of the protection which they ought to enjoy. \* \* \* But wherever there is evidence of malice either extrinsic or intrinsic, in answer to the immunity claimed by reason of the occasion, a question arises which the jury, and the jury alone, ought to determine.

In a late case, *George v. Goddard*, (2 F. & F. 489,) the words were spoken at a parish meeting against the plaintiff's conduct as an overseer, charging him with embezzlement. On motion for nonsuit *Cockburn*, C. J., said, "I shall tell the jury that the occasion was privileged, but that the state-

ment though made on such occasion will be unprivileged, if the making of it was a malicious abuse of that occasion. They have a right to ascertain the real meaning and intention of the plaintiff in the words complained of. \* \* \* If defendant simply meant to censure the conduct of the plaintiff as overseer, &c. &c., his statement was privileged by the occasion. If, on the other hand, he availed himself of the opportunity afforded him by the meeting of the ratepayers to bring forward a charge against the plaintiff, not merely of exceeding his duty, but of corruptly violating it, by applying the parish money to his own private purposes, the statement was not privileged, nor was it protected by the occasion. If the language of defendant was entirely disproportioned to the circumstances under which he would be privileged by the occasion, the jury would be justified, I think, in inferring malicious motives, for they only would be the motives which would prompt such language."

In *Humphreys v. Stilwell*, (2 F. & F. 590,) *Williams, J.*, also left it to the jury if there was malice, telling them the occasion was privileged, and if no malice a verdict should be for defendant. In *Maitland v. Bramwell*, (Ib. 628,) *Byles, J.*, took a somewhat similar course.

We think we must assume the law to be as laid down by the courts in banc, after full argument, and that it is a question for the judge at the close of the plaintiff's case. As Lord *Campbell* suggests, in *Cooke v. Wildes*: "In the case most frequently occurring, of an action for defamation, on the occasion of giving the character of a servant, on evidence being given of declarations by defendant of spite and illwill towards the plaintiff, and a desire to injure him, the jury, as a matter of course, are asked if they believe these declarations, and what effect is to be given to them. In the absence of such extrinsic and intrinsic evidence of malice to withdraw the immunity of privilege, we think the judge should not leave the case to the jury.

As to the count for libel, I think the case of *Turnbull v. Bird*, (2 F. & F. 508,) much in point. Sir William *Erle* says, "The law is that a man may publish defamatory matter of another holding any public employment, if it is a matter

in which the public have any interest, within the limits I will lay down in accordance with decided cases. Every person has a right to comment on the acts of a public man which concern him as a subject of the realm, if he do not make his comments the vehicle of malice or slander. \* \* \* The rule is, that the comments are justified provided the defendant honestly" (*qu.* and reasonably, see note *a*, page 524) "believed that they were fair and just. With that limitation the law allows the publication. The word 'malice' in law means any corrupt motive, any wrong motive, or any departure from duty." He told the jury, "If you are of opinion that the defendant in the comments that he made was guilty of any wilful misrepresentation of fact, either by the exaggeration of what actually existed, or by the partial *suppression* of what actually existed, so as to give it another colour; or if he made his comments with any misstatement of fact which he must have known to be a misstatement if he exercised ordinary care, then he loses his privilege, and the occasion does not justify the publication, which would then be actionable."

In the case before us there is a general verdict on the whole declaration for the plaintiff. We think there should be a new trial without costs. We consider the defendant might have rightly claimed the decision of the judge as to words being privileged or not, and we hardly see anything to be left to the jury therein.

As to the count for libel, we think the learned judge might have either formed his own opinion on it as a question of privilege, or at all events have left it to the jury with a strong caution as to usual liberty of discussion allowed in all matters of public interest, and with observations somewhat like those quoted from Sir *William Erle's* charge.

As the plaintiff has, according to the judgment of this court, established his position as an authorised practitioner, and as a new trial is now directed without costs, the court may express a strong hope that the parties will now consent to a *stet processus* being entered, and not render a second trial necessary. This was the course recommended and adopted in a somewhat similar case, already quoted, of *Cooke v. Wildes*, (5 E. & B. 328.)

Rule absolute.

GOODWIN V. THE OTTAWA AND PRESCOTT RAILWAY  
COMPANY.

*Sheriff's sale of stock—Action by purchaser claiming mandamus to transfer—  
C. L. P. A., secs. 255, 256, Consol. Stats. C., ch. 70.*

In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff in their register as a shareholder in respect of such stock: *Held*, that the provisions of Consol. Stats. C., ch. 70, as well as the C. L. P. A., secs. 255, 256, must be obeyed; and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail.

THIS was an action of mandamus. The declaration set out that defendants were an incorporated company, with a joint transferable stock, and that the municipality of the city of Ottawa held 1500 shares therein: that the Bank of Montreal recovered judgment against the municipality, and execution issued, and the sheriff seized in execution the said stock, and afterwards in due form of law sold the same to the plaintiff, and thereupon the sheriff gave to the plaintiff a certificate under his hand and seal of office, declaring that he had sold on said execution the said 1500 shares to the plaintiff, and thereupon the plaintiff produced said certificate to the secretary of defendants, being the proper officer in that behalf, and demanded of him to transfer said shares from the name of the municipality to the plaintiff's name in defendants' books, averring that upon production of said certificate it was the defendants' duty to enter the plaintiff upon their books and registry of shareholders as a shareholder in respect of said stock, according to the statute—with the usual averment of the plaintiff's interest in being so entered, and damage sustained by defendants' non-performance of their duty, neglect, and refusal of defendants so to do, that all conditions had been fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiff to performance of said duty by defendants; and a mandamus was claimed to compel performance.

*Pleas.*—1. Not guilty. 2. Traversing the duty alleged. 3. No tender of fee for the transfer. 4. That since 1852 all transfers should express whether the stock transferred was sold or preferential stock: that the sheriff's sale and certificate were since the company issued preferential stock, and the

certificate given by the sheriff did not express whether the stock transferred was old or preferential stock.

The defendants also demurred to the declaration.

The issues were tried before *Richards*, J., at the last Guelph assizes. The only witness called was the deputy-sheriff of Carleton. He proved the certificate of sale of the stock, dated 25th of August, 1862: that the sale was on the 12th of July: that some time after he went with the plaintiff's brother to the company's office to get the secretary to transfer the stock to the plaintiff: that he declined in fact to do so: that the witness demanded the books to do it himself; and that no tender was made of fees or demand thereof. He said on cross-examination that he had made two sales on the 2nd of July, and he served a notice on the company as well as a certificate on the 3rd of July; and on the 12th of July another sale through the plaintiff's attorney, Ross. The first sale was by James Goodwin's (plaintiff's brother) directions to the plaintiff, who was not present: they asked for a certificate some time before he gave it: he thought he gave it on the second sale, not the first: the secretary and witness and James Goodwin were alone present.

For defendants it was objected that the stock sold was that of the mayor and commonalty of the city, while the stock in the declaration was alleged as the stock of the municipality of the city of Ottawa: that the certificate put in was not that required by law under the Consol. Stats. C., ch. 70: that no copy of execution was served on the company: that the duty was cast not on the company, but on the officers: that no deed of assignment from the sheriff reciting the transfer and the kind of stock was shewn: that there was no evidence that Ross or James Goodwin had authority to purchase.

Leave was reserved to defendants to move for a nonsuit on any of these grounds. The demurrer to the declaration raised somewhat the same objections, with some others, and was argued at the same time as the rule.

*Richards*, Q. C., obtained a rule to enter a nonsuit pursuant to the leave.

*Cameron*, Q. C., shewed cause, and cited Bullen and Leake Prec. 210; *Norris v. The Irish Land Company*, 8 E. & B. 512.

*Richards*, Q. C., contra, cited Tapping on Mandamus, 283, 285, 286; *Regina v. Sealey*, 8 Jur. 496; *In re School Trustees of Port Hope, and the Town Council of Port Hope*, 4 C. P. 418; *In re School Trustees of Collingwood and the Municipality of Collingwood*, 17 U. C. R. 133; *The Queen v. The Bristol and Exeter R. W. Co.*, 4 Q. B. 162, 169; *The Queen v. The Commissioners of Excise*, 6 Q. B. 981, note; *The King v. The Brecknock and Abergavenny Canal Co.*, 3. A. & E. 217; *The King v. The Wilts and Berks Canal Co.*, *Ib.* 483.

The statutes referred to are cited in the judgment.

HAGARTY, J., delivered the judgment of the court.

According to the system that seems, to my great regret, to be becoming general, to the vast increase of cost to suitors, and unnecessary labour to all parties concerned in the administration of justice, there is a demurrer to the declaration and also issues in fact.

The chief objection taken on the demurrer and urged at the trial seems to be that the plaintiff has not conformed to the requirements of the Consolidated Statutes of Canada, ch. 70.

It may be as well to consider this firstly, as if the defendants' view be correct the plaintiff cannot succeed.

It is somewhat perplexing to find two acts of Parliament bearing directly on the same subject, passed during the same session, and coming into force on the same day, and each making no reference to the other, except the figures of the number of the other act at the end of the clauses, added by the consolidators of our statute law.

The Common Law Procedure Act, ch. 22, Consol. Stats. U. C., sec. 255, enacts that "the stock held by any person in any bank, or in any corporation or company in Upper Canada, having a joint transferable stock, may be taken and sold in execution in the same manner as other personal property of a debtor."

Section 256. "Upon the production of a certificate under the hand and seal of office of the sheriff, declaring to whom any stock taken upon an execution has been sold by him, the cashier of the bank, or the proper officer of any other such company or corporation, the stock of which has been sold, shall transfer such stock from the name of the original stockholder to the person named in the certificate as the purchaser under the execution," &c. &c.

This statute seems to have been alone in the plaintiff's view, and he has acted on its directions.

Chapter 70, Consol. Stats. C., sec. 1, declares that all shares, &c., of stockholders in incorporated companies shall be held to be personal property, and shall be liable as such to creditors for debts, and may be attached, seized, and sold under writs of execution from the courts of law in like manner as other personal property.

Section 2 enacts that whenever any share has been sold under a writ of execution, the sheriff by whom the writ has been executed shall within ten days after the sale serve upon the company, &c., an attested copy of such writ of execution, with his certificate endorsed thereon, certifying to whom the sale of such share has been by him made, and the person who has purchased the same; and the person so purchasing shall thereafter be a stockholder of said shares, and have the same rights and be under the same obligations as if he had purchased said shares from the proprietor thereof in such form as by law provided for transfer of stock in such company; and the proper officer of the company shall enter such sale as a transfer in the manner by law provided.

Section 3 directs a sheriff, if required, to seize, and to serve a copy of the writ on the company with notice of seizure, from which time it avoids all transfers as against the execution, &c.

Section 6 declares that nothing in this act shall be construed to weaken the effect of any remedy which such plaintiff might without this act have had against any shares of such stock by *saisie arrêt*, attachment, or otherwise, but on the contrary the three next preceding sections should apply

to such remedy in so far as they can be applied thereto. That would refer to sections 3, 4, and 5.

The rule for the construction of statutes passed regarding the same subject-matter is, I presume, as laid down in Dwarries on Statutes, page 569: "It is therefore an established rule of law that all acts *in pari materie* are to be taken together, as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system, and having one object in view."

The clauses 255, 256, of the Common Law Procedure Act are copied from the 2 Wm. IV., ch. 6, an Upper Canada act. The act also cited, ch. 70, Consol. Stats. C., is a reprint of an act of 1849, 12 Vict., ch. 23. When the latter was passed by the Legislature of Canada the Upper Canada act had been some years in force. The act of 1849 begins with declaring that "it is expedient to make better provision for the seizure and sale of shares and dividends of the stockholders of all incorporated companies."

We think we must read these two statutes together, and that we are bound to see that the requirements of each of them be obeyed. The earlier act simply required the transfer to be made on the sheriff's certificate, declaring to whom he had sold. The later enactment requires that within a certain time from sale he must serve on the company an attested copy of the writ of execution, with his certificate certifying to whom the sale has been made by him, and the person who has purchased.

We are of opinion that as this has not been done the rule for nonsuit must be made absolute.

Rule absolute.

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## ASH V. SOMERS.

*Deed—Description of land—Construction.*

The north half of lot 24 in the second concession of Darlington, according to the original survey, contained 108 acres. B. conveyed to defendant "the south 100 acres of the north half," and afterwards to the plaintiff, "eight acres, more or less, being the north eight acres of lot 24, &c., and being all the north half of said lot contains over 100 acres." The Kingston road, not being an original allowance, but substituted for it owing to natural obstructions, ran through the south part of the north half, taking up two acres, and had been established as a highway by user for forty years. Whether it existed before the deed to defendants, or whether the soil had become vested in the Crown under our statutes, did not appear.

*Held*, that the deed to defendant could cover only 100 acres in all, not exclusive of the road, and that the plaintiff was entitled to the remaining eight acres.

SPECIAL CASE stated for the opinion of the court, without pleadings, as follows :—

This is an action of trespass brought against the defendant for cutting certain trees growing upon two acres, part of the north half of lot number 24 in the second concession of the township of Darlington, being the premises in dispute between the parties hereto; and to determine the title to the two acres this action is brought.

The following question is stated for the opinion of the court :—

The north half of lot number twenty-four in the second concession of the township of Darlington, as laid out by the late government, of that portion of the province of Canada formerly called Upper Canada, contains one hundred and eight acres, but the Kingston road runs through the southern portion of it, and has done so for more than forty years, and statute labour has been usually performed upon the said road, so this portion of the said lot has become devoted to the use of the public as a highway by length of possession, the regular surveyed line for the Kingston road having never been used on account of natural obstructions. The strip of land thus used as a highway is just two acres.

The deed to the defendant, under which he claims a portion of the said half lot, is from one David F. Burk, who at the time owned the whole north half of the said lot, contains full covenants for title, and was made and registered before the plaintiff's deed, and describes the land conveyed, as follows, that is to say, "one hundred acres, being composed of the south one hundred acres of the north half of lot number 24, in the second concession of the township of Darlington aforesaid."

The deed under which the plaintiff claims is from the same party, contains qualified covenants for title, and describes the land conveyed as follows, that is to say, "eight acres, more or less, being composed of the north eight acres of lot number 24 in the second concession of the said township of Darlington, being all the north half of said lot contains over 100 acres."

The plaintiff contends that he is entitled to the full quantity of the land mentioned in the deed, that is to say, the north eight acres, while the defendant contends that he is entitled to the full one hundred acres, exclusive of the said Kingston road.

The question for decision is, Does the defendant's deed cover these two acres, the defendant's deed having been made and registered prior to that of the plaintiff, but neither party having enclosed or taken actual possession of the premises?

If the court shall be of opinion in the negative, then judgment shall be entered up for the plaintiff for \$60, and the costs of the suit.

If the court shall be of opinion in the affirmative, then judgment of *nol. pros.*, with the costs of defence, shall be entered up for the defendant.

*English*, for the plaintiff, cited *White v. Myers*, 10 U. C. R. 574; *Joiner et al. v. Colborne*, 11 U. C. R. 631; *Mahony v. Campbell*, 15 U. C. R. 396; *Consol. Stats. U. C.*, ch. 54, sec. 331.

*M. C. Cameron*, for defendant, cited *Consol. Stats. U. C.*, ch. 54, sec. 313.

McLEAN, C. J.—It is stated in the special case "that the regular surveyed line for the Kingston road has never been used on account of natural obstructions." The present road has been used by the public therefore from necessity, and the use for upwards of forty years, and the performance of statute labour for so long a period upon it, confers a right of way which cannot now be questioned.

It was originally part of the north half of number 24, and must have been contained in the patent from the Crown with the rest of that lot; at least such a presumption arises from the fact that in the original survey of Darlington an allowance for road was laid out, which it became impossible after-

wards to use owing to "natural obstructions." Whether the road now in use was laid out by the court of quarter sessions approving a road surveyor's report, or whether any other form was used in establishing a road across number 24, is not stated, and probably from the length of time cannot now be readily ascertained; or whether the new road across the north half was reserved before the patent issued instead of the impracticable line originally surveyed in front.

I think, however, we must assume that the road across the north half has become established since the patent issued. If it were otherwise, it would be on land of the Crown; but the patentee having conveyed to the defendant, apparently with a full knowledge of the precise quantity of land contained in the lot, the south one hundred acres of the north half of the lot, he must have intended to convey and did convey as a portion of the south one hundred acres that part which was then used as a public highway. This of course he could do if the patent covered the premises; for the freehold would be in him, though subject to a public right of way, if such right of way had been acquired previously: if no such right of way had been acquired before the conveyance to the defendant, then the south one hundred acres might have been conveyed without any restriction.

Having sold the south one hundred acres of the north half of the lot, and the road according to the statement running through that half, and forming part of it, there can be no doubt that the road forms part of the *land conveyed* to the defendant, and that of the surplus contained in the north half he cannot claim two acres to make up the quantity occupied by the road. Whether Burke had a right to convey the road allowance as part of the south one hundred acres of the north half of 24 would depend on the state of his title at the time, but it is quite clear that the intention was to convey the road allowance with the rest. He subsequently conveyed to the plaintiff eight acres, *more or less*, of the north half of lot number 24, in the second concession, being all that the north half contains over one hundred acres. It is clear that it was never contemplated by the

owner that these deeds could clash, or that any land not included in the south one hundred acres of the north half could be claimed as conveyed by the deed for the one hundred acres so limited. The description given of the land remaining after the first conveyance was executed, which was subsequently sold to the plaintiff, is worded with great caution. The quantity is stated at eight acres, more or less, and then by way of still further caution it is added, "*being all the north half of the said lot contains over one hundred acres,*" and being the north eight acres of the north half of the said lot number 24, shewing that the first conveyance was considered to cover one hundred acres, including the road, and the last eight acres being the whole quantity which the north half contained over and above one hundred acres. I think the conveyance to the defendant cannot be taken to cover any land but the south one hundred acres, including the road, and that judgment must be entered for the plaintiff for \$60, and the costs of this suit.

HAGARTY, J.—The point to be decided on the special case is briefly this. The north half of 24, in the second concession of Darlington, as laid out by the Crown, contained one hundred and eight acres. For upwards of forty years the Kingston road has run through it, not being an original allowance, but indisputably established and having had statute labour usually done upon it.

David Burke owned all this half, and conveyed in fee to defendant "one hundred acres, being composed of the south one hundred acres of the north half of 24, in the second concession of Darlington." Subsequently he conveys in fee to the plaintiff "eight acres, more or less, being composed of the north eight acres of lot 24, in the second concession of Darlington, being all the north half of said lot contains over one hundred acres."

The Kingston road takes two acres from the north half of the lot, crossing it far south of the land in dispute. The defendant, to whom one hundred acres was conveyed, contends that he thereby was entitled to a clear one hundred acres, not counting the two acres taken by the road. If he

be correct in this, then only six acres instead of eight passed by the latter deed to the plaintiff.

No question of possession arises. It is purely one of construction.

It appears to me that we must take the words "the south one hundred acres of the north half," as referable to the lot as originally laid out, and that we cannot read them as meaning such one hundred acres of the north half as the grantor when he made the deed could absolutely convey to his vendee in the then state of his title. The fact that the public had acquired a right of way by user or dedication over the premises, or that the grantor had previously expressly conveyed away the land occupied by the Kingston road, or that he had made a deed in fee of any two acres at the south-east or south-west angle of the north half, might be a breach of his covenants; but as at present advised I do not think any of these circumstances can affect the clear words used as matter of description, identifying what land was sold, and on what land the conveyance was to operate.

I cannot gather from the case whether the earlier deed was made before or since the Kingston road crossed the land. I may assume that the deed was since that time. Nor can I see whether at the execution of the deed the soil and freehold of this road had become vested in the Crown, as it has been for some years back by several statutes. If when the deed was made, the soil and freehold still remained in the grantor, subject to the right of the public to use the road, the case would be still stronger against the defendant; but were it otherwise, I still think the land occupied by the road, although now owned by the Crown, must be reckoned with the south one hundred acres of the north half.

I think no part of the surplus of eight acres ever formed part of the south one hundred acres of the north half.

Judgment for the plaintiff.

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THE CORPORATION OF THE COUNTY OF MIDDLESEX v. THE  
CORPORATION OF THE CITY OF LONDON.

*Jury expenses—Consol. Stats. U. C., ch. 31, secs. 155, 156—Mode of computation.*

In computing the proportion of jury expenses payable by a city and county under the Jury Act, secs. 155, 156, the assessed value of the rateable property of the city, on which their proportion is calculated, is to be taken not as the assessed annual value, but as a sum of which that forms ten per cent. : *e.g.* if the annual value in any year be £6000, the share of the city is to be calculated upon £60,000.

THIS was an action brought by the plaintiffs against the defendants to recover the sum of \$3409.24, for the use of the gaol and court-house by the defendants, and for the proportion of the expenses incurred by the plaintiffs for the payment of jurors for the years 1855 to 1861, inclusive, and interest.

The cause came on to be tried before *McLean*, C. J., at London, when a verdict was taken for the said plaintiffs for \$3409.24, subject to the opinion of the court upon the following

CASE:—

The only matter in dispute between the parties in this suit is with respect to the amount which the city ought to contribute to the jury expenses, the parties differing as to the mode by which that amount should be computed.

Accordingly, referring to the statutes 22 Victoria, chapter 31 of the Consolidated Statutes of Upper Canada, entitled "An act respecting jurors and juries," section 155 and 156, (a) the plaintiffs affirm that the proportion pay-

(a) The clauses referred to are as follows:—

Sec. 155.—The municipal corporation of any county in Upper Canada, of which a city or town withdrawn from the jurisdiction of the county council forms part for judicial purposes, may demand and recover from the municipal corporation of such city or town a portion of the expenses incurred by such county in any year, for the payment of jurors, which portion shall be determined as follows:—

1. From the total sum expended in the county in any year, for the payment of jurors and other fees and disbursements under this act, there shall be deducted the sums paid to jurors for attendance at the courts of quarter sessions, and the sum actually received by the county in such year for fees and penalties, which under this act are appropriated towards the payment of jurors.

2. Of the sum remaining after such deduction the portion to be equally borne by the city or town, and by the county respectively, shall be in proportion to the assessed value of all the rateable property in each, and the

able by the city should be regulated as follows:—*exempli gratia*,

Assuming the assessed annual value of the rateable property in the city of London, for any year, to be £6000, the plaintiffs affirm that this sum of £6000 must be taken as ten per cent. of the actual value of that property, which actual value would consequently be £60,000, and that therefore this sum of £60,000 should be taken as a basis upon which the amount payable by the city for the jury expenses of that year ought to be computed.

On the other hand, the defendants deny that the above mode is the correct mode of computation, and affirm that, assuming the assessed annual value of the rateable property of the city, for any year, to be £6000, this sum of £6000 must be taken as the basis upon which the amount payable by the city for the jury expenses of that year ought to be computed.

If the court shall be of opinion in the affirmative—that is to say, that the mode of computation which the plaintiffs contend for, as mentioned above, is in accordance with the law—then the verdict is to be entered for the plaintiffs as aforesaid, for the sum of \$3409.24.

But if this court shall be of opinion in the negative—that is to say, that the mode of computation which the plaintiffs contend for, as mentioned above, is not in accordance with the law, but that the mode of computation contended for by the defendants, as above mentioned, is correct—then the verdict is to be entered up for the plaintiffs for the sum of \$984.51.

A schedule, which it is considered unnecessary to give here, was attached to the case, shewing the actual value of the rateable property of the county of Middlesex, and the annual value of the rateable property of the city of London for the years 1855 to 1861, inclusive, respectively, and the population of the city and county in different years, in order to

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sum to be finally borne by the city or town shall be the sum to be repaid by the municipal corporation thereof to that of the county.

3. In comparing the value of the rateable property in any city or town and county for the purposes of this act, the assessed annual value shall be held to be ten per cent. of the actual value.

Sec. 156.—The actual or annual value of rateable property in a city or town or county for the purposes of this act, shall be that shewn by the assessment rolls of each for the year in which the expenses to be divided between them are incurred, and the portion of such expenses to be finally borne by the city or town shall be payable to the county immediately after the close of each year.

assist in illustrating to the court the two modes of computation above mentioned, and their effect, if required.

*Connor*, Q. C., for the plaintiffs.

*McMichael*, for defendants.

MCLEAN, C. J.—The assessment in cities and towns being upon the annual value, and in counties upon the actual value, the third sub-section of section 155 declares that the annual value shall be held to be *ten per cent.* of the actual value. The whole object of that enactment is to equalise as nearly as can be done the proportions to be paid by each; for if some such standard were not established, it is evident that persons assessed yearly on the actual value of property would pay an amount far greater than those in cities assessed only on the annual value. I think the plaintiffs are right in their mode of computation, and that they are entitled to recover according to that mode.

HAGARTY, J.—We may safely assume that such a construction as the city contends for could hardly have been intended by the Legislature, as it would apparently defeat all idea of any rational proportion between the respective rateable property of each municipality as the measure of liability.

The defendants insist that the words are on “the assessed value,” and that in their city the only assessed value is the annual value, and that it is only this annual value that is the assessed value.

It may be literally true that in the city rolls the only value appearing is an annual value, except, perhaps, that if the roll strictly conforms to the 19th section of the Assessment Act, (Consol. Stats. U. C., ch. 55,) one column would shew the total value of *personal* property, and another column the yearly value of the same.

We also know judicially that in the city assessment roll, in the case of real estate, the assessed value is an annual value; and the Legislature expressly meet a case like the present by qualifying sub-section 2 by the succeeding sub-

section 3, that in comparing the value of rateable property in any city or town and county for the purposes of the act, the assessed annual value shall be ten per cent. of the actual value, and in the next section that the actual or annual value shall be that shewn by the assessment rolls.

I therefore think the plaintiffs' construction is the true one, and that the *postea* should be delivered to them for the sum claimed.

*Postea* to the plaintiffs.

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ADAMS V. NELSON.

*Mortgage given for notes—Fraud—Right to sue on the notes.*

The defendant being indebted to the plaintiff on bills and notes executed to him a mortgage for the amount, which the plaintiff accepted on defendant's representation that it was a first claim on the land. On going to the registry office at once, the plaintiff's attorney found a prior encumbrance, and immediately went to defendant and told him the plaintiff would not accept the mortgage.

*Held*, that the plaintiff could not thereupon sue on the original cause of action, but should at least have tendered a reconveyance.

To a declaration on notes and bills, the defendant pleaded an accord and satisfaction by delivering to the plaintiff a deed by way of mortgage. The plaintiff replied that he accepted the mortgage on a fraudulent representation by the defendant that it was a first mortgage on the premises, whereas it was effectually preceded by a prior mortgage to Torrance, whereby the plaintiff's mortgage became of no use, and immediately on discovering the fraud he notified the defendant that they repudiated and abandoned the mortgage.

At the trial, at London, before *McLean*, C. J., the only witness examined was Mr. Elliot, the plaintiff's attorney, and the only point in issue was whether the defence set up by the plea was avoided by the replication, setting up the fraud of the defendant.

As far back as May, 1862, the defendant had written promising to give the plaintiff a mortgage on a store in Chatham for the debt due. On the 11th of July Mr. Elliot went to Chatham, and the defendant promised to give a mortgage. He said the store was free from encumbrance—not a dollar

on it. After this several letters passed, and the defendant wished a claim of one Ash to be included in the mortgage, to which the plaintiff assented, and the witness wrote to the defendant that he would be in Chatham on the 14th of August. He went up with Cleghorn, one of the plaintiffs. Defendant produced an abstract of his title. Some discussion arose respecting a will which seemed to affect the title, and Mr. Elliot said he wished to have the abstract complete. Defendant said he might rely on his statement that there was no encumbrance whatever; it was just as the abstract shewed, without encumbrance. The mortgage was then taken on defendant's representations. The witness went at once to the registry to record it. When there he enquired about the title to see if all was right, and ascertained that the defendant had given a mortgage on some property on the 7th of August, for \$1400, to Torrance. Witness took away the mortgage and memorial and went at once to the defendant, and told him he had discovered his fraudulent conduct, and told him he might have saved him the trouble of coming to Chatham; that the mortgage was useless and would not be accepted. Defendant did not seem inclined to take them, (*i.e.*, the mortgage and memorial,) and witness took them, to shew the transaction. Defendant seemed ashamed of himself, and all he said was muttering that the property was a sufficient security for both the plaintiff and Torrance. The witness then issued a writ at once, having told the defendant he would do so.

On cross-examination, he said he could have found the encumbrance by going to the registry, but relied on the defendant's abstract and statement, and was deceived.

A verdict was taken for the plaintiff subject to the opinion of the court.

*Connor*, Q. C., for the plaintiff, cited *Feret v. Hill*, 15 C. B. 222.

*Douglas*, for the defendant, cited *Bowles v. Round*, 5 Ves. 508; *Sugden V. & P.* 13th Ed. 204; *Stevenson v. Newnham*, 13 C. B. 285, 302, 303; *Thomas v. Crooks*, 11 U. C. R. 579; *Addison on Contracts*, 5th Ed. 247.

HAGARTY, J.—I am of opinion that the plaintiff cannot recover on such a state of facts as is before us. An estate has been conveyed to him by deed, and I cannot think that he is entitled to treat it as so utterly null and void, that the mere telling defendant that he repudiated it can be sufficient to entitle him to recover on the original cause of action, as if no such deed had existed. It was at most voidable. The plaintiff could have upheld it if he pleased, and taken any benefit upon it that was open to him. If he can recover on the ground that the whole transaction was void through the defendant's fraud, I do not see why he might not do so without even notifying him that he repudiated the instrument.

If a horse had been delivered in satisfaction, and the plaintiff proved that he only accepted it on the defendant's false representation that it was sound, I think he could not avail himself of such an answer merely on proof that he told the defendant that he repudiated the bargain. He should, I think, give or tender back the horse. There is no doubt some distinction between this and the case of a chattel passing by delivery; but I cannot think that any man to whom an estate is conveyed by deed, he assenting thereto at the time of execution, can insist on avoiding the transfer without doing all in his power to undo it, as it were, by executing or tendering an assignment or reconveyance.

No case is cited for the plaintiff supporting his view; and in the absence of direct authority I think either a court of law or equity would require a reconveyance as the one clear legal method of divesting the plaintiff of any estate or interest which passed by the deed. The plaintiff had to insist that nothing passed. I repeat that, if so, I do not see that he had to give any intimation to defendant of his objection to it. The very requirement of any notice would seem to shew that it was only voidable at the plaintiff's option. If voidable, my present impression is very strong that the plaintiff should have by an unequivocal act, like a reconveyance, have put an end to the transaction, and thus remitted all parties to their former rights, and judgment of nonsuit should be entered.

*Per cur.*—Nonsuit to be entered.

## PEARMAN V. HYLAND.

*Mortgage—Omission of covenant to pay—Right of action—Evidence*

Defendant, in consideration of \$530 acknowledged to be paid, assigned to the plaintiff a mortgage for £360, with a proviso that the assignment should be void on payment of the \$530 and interest, *but no covenant to pay*. *Held*, affirming *Hall v. Morley*, 8 U. C. R. 584, that no action could be maintained on the common counts.

There was a special count, that in consideration that the plaintiff would assign to one H. a judgment which he had recovered against the defendant and M. for £133, 5s. 10d., the defendant promised to pay him that sum. The plaintiff's attorney swore that such judgment had been recovered, and at defendant's request assigned to H., defendant's son, defendant thinking that he could get the amount from M.; and that the mortgage was assigned as collateral security, but by mistake no covenant to pay was inserted in the assignment. Neither the judgment nor assignment of it however were proved.

*Held*, that the motion for nonsuit was entitled to prevail, but a new trial was allowed on payment of costs.

THE first count of the declaration was, that in consideration that the plaintiff would assign to one J. T. Hyland the debt and interest due or to become due on the judgment recovered by the plaintiff against defendant and one Matthews for £133, 5s. 10d. and costs, the defendant promised to pay the plaintiff said sum and interest at 12 per cent.; and that the plaintiff did assign said debt. Breach—non-payment. Common counts were added for goods and choses in action sold and assigned; money lent, money had and received, and account stated.

*Plea*, never indebted.

The case was tried at Brantford before *Richards, J.*

The plaintiff proved an assignment made by defendant to him on the 19th of January, 1860, reciting a mortgage made by Matthews and wife to Henry Prior to secure £360, and that Prior did on the 5th of July, 1859, assign said mortgage to defendant, and that £360 was then due thereon.

It was then witnessed that in consideration of \$530, then paid by plaintiff to defendant, and acknowledged, the defendant bargained, sold, &c., the lands in the mortgage and all defendant's estate therein, to hold to the plaintiff, his heirs, &c., subject to Matthews' right to redeem; but that the assignment was on condition to be void if defendant paid to the plaintiff the said sum of \$530, with interest at 12 per cent. from the 19th of October, 1859, to the 19th of January,

1861. Then followed a grant of the money and interest secured by mortgage absolutely in case default should be made in payment of the said \$530 and interest, on or before the 19th of January, 1861; a power of attorney to receive the money; and a covenant that the assignor had done no act to encumber, &c., and for further assurance, and a covenant by plaintiff, the assignee, to reconvey on payment of the principal moneys and interest, according to the assignment, free from encumbrances put thereon by the assignee. No covenant to pay was contained on the part of defendant.

Mr. Brooke, the plaintiff's attorney, proved that he had recovered a judgment for the plaintiff against defendant and Matthews, and that defendant proposed to the plaintiff to assign it to his, defendant's, son for him, and that he, defendant, thought he could get the amount from Matthews, and as a collateral security he should execute this assignment now in evidence to the plaintiff; that all this was accordingly done, but by a mistake no covenant to pay was inserted in the assignment. Neither the judgment nor the assignment was proved.

*Vannorman*, for defendant, moved for a nonsuit, objecting to the deficiency in the evidence: that the special count was not proved, and that the plaintiff could not recover on the common count.

The learned judge reserved leave to move for a nonsuit, and directed a verdict for the plaintiff.

*Vannorman* obtained a rule *nisi* accordingly, citing *Allnutt v. Ryland*, 11 C. P. 300; *De Tuyl v. McDonald*, 8 U. C. R. 171; *Hall v. Morley*, *Ib.* 584.

*Burns* shewed cause, and relied on *King v. King*, 3 P. Wms. 358.

HAGARTY, J., delivered the judgment of the court.

At the trial the plaintiff proved nothing by legal evidence, except the assignment of the mortgage from defendant to plaintiff, and his case has to stand or fall thereon. The instrument contains no covenant or promise to pay, and no groundwork was laid, as in the case of *Yates v. Aston*, (4

Q. B. 194,) of an actual loan of money payable on request, or at a fixed time. If we may judge from Mr. Brooke's evidence the original debt passed into judgment, and the true consideration of the assignment was the assignment of that judgment debt to defendant's son, at his request.

The case is thus narrowed down to the question, Is there anything in the language of this assignment of mortgage to shew a debt due which can be recovered on the common counts?

We think the case in this court of *Hall v. Morley*, cited by Mr. *Vannorman*, concludes the matter in favour of the defendant.

There was a mortgage of land in consideration of money, acknowledged in the usual manner, with a proviso for making it void if defendant paid plaintiff the same sum as had been stated as the consideration at a specified time. The late learned head of this court reviewed the cases from *Peere Williams* downwards, and the decision of the court was, "that the mortgage alone did not sustain an action on either of the counts; and there was a total absence of other evidence."

Bound by this decision, as well as concurring in it, we think the rule for nonsuit must be absolute, unless the plaintiff elect by the first of next term to take a new trial on payment of costs.

### BERGIN V. THE SISTERS OF ST. JOSEPH.

#### *Will—Construction—Condition against alienation.*

Under the following will: "Should my beloved wife Catharine survive me, all my worldly substance, all that I am worth, all my worldly estate, I give and bequeath to her for ever, to dispose of it as she may think proper. Be it understood this power of authority it is only during her widowhood: if the estate or property be not alienated during her natural life, or no will by her made in favour of any of my brothers and sisters, or any of their children, then, and not till then, I give and bequeath unto my sister Mary, or to her heirs for ever (the land in question). Those lands or estate devised is not to be sold or mortgaged for ever out of the family, except one brother or sister to the other, or to a brother's or sister's children, as far as the second degree."

*Held*, that the widow took an estate in fee, and that the defendants, to whom she had conveyed, were entitled to recover in ejectment.

EJECTMENT, for the north half of lot 19, in the first concession of the township of Oro, and the north half of lot 19, in the first concession of the township of Vespra.

The Sisters of St. Joseph were admitted to defend by order of a judge, and appeared and defended for the whole of the premises mentioned in the summons.

The plaintiff claimed title as heir-at-law of Michael Bergin, deceased.

The defendants denied the title of the plaintiff, and claimed title in themselves under a deed from Catharine Bergin, who was devisee of one Michael Bergin, through whom the plaintiff claimed.

At the spring assizes at Barrie, in 1862, before *Draper*, C. J., a verdict was found for the plaintiff, subject to the opinion of the court.

It was admitted by the defendants that the plaintiff was a brother of Michael Bergin, deceased, who died without issue about the month of April, 1852, having made a will duly executed to pass real estate in Upper Canada, in the words and figures following:—

“In the name of God, Amen, I, Michael Bergin, of the township of Oro, in the county of Simcoe, in the Home District, Canada West, yeoman, considering the uncertainty of this mortal life, and being of perfect sound mind and memory, blessed be Almighty God for the same, do make and publish this my last will and testament, in manner and form following, that is to say: should my beloved wife Catharine Bergin survive me, all my worldly substance, all that I am worth, all my worldly estate, I give and bequeath to her for ever, to dispose of it as she may think proper, (be it understood,) this power of authority it is only during her widowhood; if the estate or property be not alienated during her natural life, or no will by her made in favour of any of my brothers and sisters, or any of their children, (then, and not till then,) I give and bequeath unto my sister Mary Muller, or to her heirs for ever, north half of lot number nineteen, 1st concession of Oro, and north half of lot number nineteen, 1st concession of Vespra. Those lands or estate devised is not to be sold or mortgaged for ever out of the family, except one brother or sister to the other, or to a brother's or sister's children, as far as the second degree. And I here appoint my beloved wife Catharine Bergin sole executrix of this my last will and testament, hereby revoking all former wills by me made.”

A deed of bargain and sale was admitted, dated the 1st

of September, 1857, whereby the said Catharine Bergin purported to convey the lands and premises for which this action is brought to the Sisters of St. Joseph for the diocese of Toronto.

The questions for the opinion of the court were:—

1. Whether Catharine Bergin had not a conditional estate devised to her, and if so, whether by her conveyance of the said estate the condition was not broken; or whether she had power to convey the said lands and premises.

2. Even if the said Catharine Bergin had not power to convey, or had merely a conditional estate in the said premises, which condition was broken by her said conveyance, then, whether the plaintiff can maintain this action during Catharine Bergin's lifetime, or at all.

3. Any other point arising on the facts.

The verdict for the plaintiff to stand, or a nonsuit or verdict for the defendants to be entered, according to the decision of the court on the case.

*McCarthy*, for the plaintiff, cited *Doe Gill v. Pearson*, 6 East, 173; *Attwater v. Attwater*, 18 Beav. 330; *Jarm. on Wills*, 3rd Ed., vol. ii. pp. 16, 17.

*Crombie*, contra, cited *Jarm. on Wills*, vol. ii. p. 15.

MCLEAN, C. J.—Judging from the words used in describing the property, “all my *worldly substance*, all that I am worth, all my worldly estate, I give and bequeath unto my beloved wife Catharine Bergin, should she survive me, for ever, to dispose of it as she may think proper,” the intention seems to be very manifest to place the whole at her disposal for ever. But from the words which follow an intention may be inferred to limit her estate to the term of her widowhood. After describing the property in terms unusually comprehensive, so as to leave scarcely a doubt of the testator's intention to leave all his worldly estate to his beloved wife, he adds, “be it understood this power of authority it is only during her widowhood.”

In the prior part of the will the testator gave all his worldly estate to his wife for ever, to dispose of it as she

might think proper; and then, after declaring that such power was only to continue during her widowhood, he states, if the estate or property be not *alienated during her natural life*, or no will by her made in favour of any of my brothers and sisters, or any of their children, (then, and not till then,) he gives and bequeathes to his sister Mary Muller, or to her heirs for ever, the north half of lot number nineteen, first concession of Oro, and the north half of lot number nineteen, first concession of Vespra, and he declares his will to be with respect to them that *those lands or estate devised* were not to be sold or mortgaged for ever out of the family, except one brother or sister to the other, or to a brother's or sister's children, as far as the second degree.

It appears to me that the restrictions intended to be imposed as to the sale or mortgage of the premises out of the family were only intended to operate in case his devise to his sister should take effect, and that was only to take effect if the estate or property was not *alienated* by his wife during her natural life, or in case of no will being by her made in favour of any of his brothers or sisters. It appears to me that the testator intended to give and did give to his wife an estate in fee: that the intention was, that she might sell and dispose of it at any time *during her widowhood*; but that in the event of the estate not being alienated, that the widow should make a will in favour of one of his brothers or sisters, but in default of her doing so, (then, and not till then,) that the property should go to his sister Mary Muller. The will, however, in my opinion, gives an estate in fee to his wife Catharine Bergin, and she had an undoubted right to convey to any person or corporation capable of holding real estate.

I have failed to see any condition attached to the estate of Catharine Bergin which could have the effect of rendering her conveyance void, or which could possibly operate as a forfeiture of her right.

HAGARTY, J.—The will of testator begins with a clear devise in fee to his wife, if she survive him.

Then come the restricting or limiting clauses.

The wife has been declared to have power to dispose of the property as she may think proper.

She is only to exercise such power during widowhood.

If she do not alienate during her natural life, (this seems unrestricted as to the object of alienation,) or if she make no will in favour of testator's brothers or sisters, or any of their children, then, and not till then, remainder in fee to his sister Mary and her heirs.

Then come these words: "Those lands or estate devised is not to be sold or mortgaged for ever out of the family, except one brother or sister to the other, or to a brother's or sister's children, as far as the second degree.

I am of opinion that this latter clause does not cut down or affect the general power of alienation previously given to the wife.

I think the testator meant to give his widow power to sell absolutely to whom she pleased: that her power of devising is limited to a class.

In this result of construction it is wholly unnecessary to discuss the questions suggested in the argument as to the legality or illegality of any restrictions or alienations. The plaintiff is heir-at-law, and claims, as I understand, to enter as for condition broken.

Had I been compelled to consider the will as imposing a restraint on alienation, except to a class named, I should then have had serious legal difficulties to overcome, before deciding that, at least in the widow's lifetime, the plaintiff could enter, and also the often-discussed doctrine of the value of such restrictions on an estate in fee.

I take it for granted that the deed to the defendants mentioned in the case is a deed purporting to convey the fee-simple, and not any lesser estate.

I think the *postea* should go to defendants.

Judgment for defendants.

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MOORE ET AL. V. EDWARD GURNEY, CHARLES GURNEY, AND  
ALEXANDER CARPENTER.

*Action by creditor of R. W. Co. against shareholder—Number of shares added after subscription—Conditional subscription—Surprise—New trial.*

In an action by a creditor of a railway company against a stockholder for calls, alleging them to have subscribed for 40 shares, the defence was, first, that the name of the firm, consisting of three members, was signed by one of the partners, on the verbal condition that unless G., another partner, who was out of the country, should assent on his return it was not to bind, and that G. refused to ratify it; and, secondly, that the figures 40, shewing the number of shares, had been inserted after the subscription by some stranger. The name of G. was allowed to be struck out as a defendant, and the jury were asked to say whether the subscription was conditional, and whether the figures 40 had been inserted by the defendants or any one authorised by them. They found for the defendants, and that the figures were not written by the partner who subscribed nor any one authorised by him.

On motion for a new trial the plaintiffs' attorney swore that this objection, as to the figures, had taken him by surprise, and that *he thought* he would be able to meet it by satisfactory evidence on another trial; in answer, the defendant who subscribed confirmed by his affidavit the finding of the jury.

The court under these circumstances refused to interfere.

*Quære*, as to the effect of such a conditional subscription. See Moore et al. v. Gurney et al., 21 U. C. R. 127.

THIS was an action under the statute by the plaintiffs as judgment creditors of the Hamilton and Port Dover Railway Company against the defendants as stockholders, to recover the amount of their unpaid stock, being 40 shares.

*Pleas*.—1. That the defendants did not subscribe. 2 and 3, pleas held bad on demurrer. (a)

The case was tried at the fall assizes for 1861, at Hamilton, before *Hagarty*, J. The only issue was on the first plea.

Mr. Burton was called for the plaintiffs. He was vice-president of the company. He produced a book of subscriptions to the stock. It appeared thus—"Gurney & Carpenter, 40 shares." Shares were £25. £50 appeared to have been paid to Wilson, the promoter of the company. Witness was present at the time of subscription. It was in Carpenter's handwriting. He did not know who paid the £50. Witness conversed with Carpenter: witness called on him to subscribe. He demurred, saying he or the firm had paid £50, intended as a gift towards the preliminary expenses.

(a) See the decision on demurrer, Moore et al. v. Gurney et al., 21 U. C. R. 127.

Witness pressed him hard to subscribe. He at last consented to put down the name of the firm, but said that Edward Gurney was absent, and if he disapproved of it it was not to be a subscription; if the subscription was to stand, the £50 was to go on it. Witness thought Charles Gurney was present and assented as the other did. The board was afterwards informed by the secretary that the defendants declined paying on the ground that Edward Gurney refused his assent.

John Hart, the defendants' book-keeper, proved the giving of a cheque for £50 towards preliminary expenses. On cross-examination he said he was present when Carpenter signed the book for Burton: did not think the figures "40" were his writing (*qu.* Burton's)—not Alexander Carpenter's writing. "Gurney & Carpenter" was in Alexander's writing. Burton spoke of 40 shares, and witness thought this was to be the amount supposing they subscribed. They both agreed it was not to be stock unless Edward Gurney on his return from the United States should ratify it. Afterwards, on his return, Burton called again and pressed Edward Gurney to consent, saying it was not stock until he ratified it. Edward said he never would ratify it. On re-examination by the plaintiff, he said he had seen the book several times, and had a faint recollection of seeing it when the "40" was not there; did not think Carpenter put any number of shares. The 40 was neither Burton's writing, nor Carpenter's, nor any member of the firm.

Mr. Burton was recalled by the plaintiffs, and said the 40 was not his writing; could not say if 40 was there at the time of subscription: was under the impression till to-day that he, witness, had written the 40: sees he did not write it. Forty shares were spoken of. There was a stock list or register. Defendants appeared on such register as stockholders. An account was opened with them as holding 40 shares, and for the £50. It occurred as Hart swore about witness calling for E. Gurney's ratification and his refusal. The contract was, it was not to be stock unless he ratified it. After his refusal no alteration was made in the shareholders' list. In 1859 witness was instructed by the company to

sue the defendants for calls. His conviction was that it would be a breach of faith, and he did not do so.

This closed the evidence, the defendants calling no witnesses.

On *Freeman*, Q. C., objecting that no joint liability was proved, the plaintiffs applied to strike out Edward Gurney's name as a defendant, which was allowed, all his costs to be paid.

It was left to the jury to say: 1. Did the defendants in fact subscribe for 40 shares as alleged, or was it an incomplete and conditional signature, to be void if Edward Gurney would not agree.

2. As to the figures 40, it was left to them as a fact whether they were written by the defendants or any one authorised by them.

*O'Reilly*, Q. C., objected to the charge, as to leaving it to the jury as a conditional or unconditional signature or subscription, urging that if the defendants once signed they were unconditionally bound.

The jury found for the defendants, saying that they found the "40" was neither written by Carpenter nor any one authorised by him.

*O'Reilly*, Q. C., obtained a rule for a new trial, on the ground of misdirection of the learned judge, in ruling that if the stock subscribed by the defendant Carpenter with the knowledge and sanction of the defendant Charles Gurney, although on the face of the subscription it appeared absolute and unconditional, yet was so made on the verbal understanding or explanation that it should be of no force or effect in case a former defendant, Edward Gurney, should not sanction it, the plaintiffs could not recover, or to this effect; and also on the ground of surprise on the point of the alleged addition of the figures 40 to the subscription, and on the affidavit of Miles O'Reilly, Esquire, filed.

*Freeman*, Q. C., shewed cause.

*O'Reilly*, Q. C., contra, cited *The Royal British Bank Ex parte Nicol*, 5 Jur. N. S. 205; *Henderson v. The Royal British Bank*, 7 E. & B. 356; *Daniell v. The Royal British*

Bank, 1 H. & N. 681; Powis v. Harding, 1 C. B. N. S. 533; Moore et al. v. Gurney et al. 21 U. C. R. 139.

McLEAN, C. J., delivered the judgment of the court.

On reference to the learned judge's notes I find that it was left to the jury to say whether the defendants did in fact subscribe for 40 shares of stock as alleged, or whether it was an incomplete and conditional signature, to be void if Edward Gurney would not agree. It was also left to the jury as a matter of fact whether the figures "40" on the subscription list were written by the defendants or any one authorised by them. The jury found for the defendants, and in giving their verdict found also that the figures "40" on the subscription list were neither written by Carpenter nor by any one authorised by him.

The learned judge left certain facts to the jury, but does not direct them to find for the plaintiffs or the defendants according to their view of these facts. It was necessary for the plaintiffs, to entitle them to recover, to prove that a certain number of shares of stock had been subscribed by the defendants Carpenter and Charles Gurney. Without the number being put down the subscription would be incomplete, inasmuch as it would be impossible to say that any definite sum was payable, and without proof that a specific sum remained due to the company by the defendants, or some one of them, the plaintiffs could not have a right to recover.

It was quite impossible under the circumstances to come to any decision or verdict without submitting to the jury a matter of fact on which such verdict must wholly depend; and whether a subscription conditionally made would entitle the plaintiffs to recover as upon a binding, complete, and voluntary subscription, incapable of being withdrawn or cancelled so as to defeat the plaintiffs' right of recovery, is not now a question requiring further consideration.

The jury have found that the figures "40" were not entered on the subscription list by Carpenter or any one authorised by him, and he has in shewing cause in this case filed an affidavit expressly denying the insertion of these

figures on such list by him or any one authorised by him. The signature of the firm is admitted to be in his handwriting, and Mr. Burton in his testimony on the trial stated that it had always been his impression that he had put down the number of shares subscribed for conditionally, but that he then saw that the figures had not been placed there by him.

Mr. O'Reilly, in his affidavit filed in moving for a new trial in this case, states that he had never heard of the intended objection before the trial: that he was taken by surprise, and had made no preparation in the way of evidence or otherwise to meet such objection: that he does not believe it to be founded on fact, and *he thinks* he will be able to produce satisfactory evidence to meet such objection on another trial of the case. Mr. Burton, who was the bearer of the stock list, and saw Carpenter subscribe the name of his firm to it, after giving his testimony in chief was recalled, and interrogated as to the insertion of the number of "40" shares, and his testimony goes far to support the objection of the defendants that these figures were placed there by some one without authority. The testimony of the defendants' book-keeper, and now Carpenter's own affidavit, and the finding of the jury on the evidence, we think cannot properly be set aside for the purpose of affording an opportunity of producing evidence which may or may not be within the power of the plaintiffs to produce. Besides, we cannot but see that this is a hard action, brought for the purpose of enforcing a *strict* legal right—the recovery of a subscription which would never have been entered into if Mr. Burton, by whom the subscription was obtained, had not consented to take it subject to the approval of an absent partner, who could not be consulted on the subject. Mr. O'Reilly in his affidavit says he *thinks* he will be able to produce satisfactory evidence to meet the objection on another trial, but we think we cannot grant a new trial on the mere chance of further evidence being brought forward on that point. The rule is therefore discharged, with costs.

Rule discharged, with costs.

MUMA V. THE NIAGARA DISTRICT MUTUAL INSURANCE  
COMPANY.

*Mutual insurance company—Misrepresentation—Encumbrance—Consol.  
Stats. U. C., ch. 52, sec. 27—Equitable pleading.*

To an action against a mutual insurance company defendants pleaded a false representation by the plaintiff on obtaining the policy, that the land on which the building stood was unencumbered, whereas in truth it was mortgaged to one S. for £94.

The plaintiff called S., who proved that at the time of effecting the policy about \$100 was due on the mortgage, after allowing all proper credits, and that the plaintiff was not then entitled to a release as of right.

*Held*, that the plaintiff could not recover, the policy being void under defendants' act of incorporation, Consol. Stats. U. C., ch. 52, sec. 27; and that evidence as to the value of the land was properly rejected.

The plaintiff replied, on equitable grounds, in substance, that he acted as agent for S., on the agreement that any moneys due to him for services should be credited on account of this mortgage: that before applying for the policy he delivered to S. a claim against a certain person, which S. accepted: that these moneys together then equalled the mortgage debt, and the same was then cancelled and paid, and S. ready to release the mortgage: that before applying the defendants delivered to plaintiff a printed form of application, and thereby required him to state that the land was unencumbered, and to make the statements in his application in the replication set forth, wherefore the plaintiff made such statement in his application, and by the procurement of defendants, and therefore the statement was not false or fraudulent.

*Semble*, that the replication, which was demurred to, was clearly bad, but as the evidence disproved it no formal judgment was given on the demurrer.

ACTION on a policy of insurance, made by the defendants on the 9th day of December, 1861, insuring the sum of \$4,300 on a frame dwelling-house and store, and household furniture, situate on lot 13 in the 7th concession of Blenheim, in the county of Oxford, for the term of three years.

The plaintiff in his declaration alleged that at the time of the making of the said policy of insurance, and thence continually until and at the loss by fire thereafter mentioned, he was the owner of the insured premises, dwelling-house, store, and furniture, and that the said dwelling-house, store, and furniture therein were afterwards, on the 5th day of June, 1862, wholly burned and destroyed by fire, the said policy of insurance and the insurance effected thereon being in full force, &c.

*Pleas*.—1. That the said policy of insurance was obtained from the defendants by fraud, covin, and misrepresentation, in this, that the plaintiff wrongfully, unlawfully, and falsely, before the making of the said policy, to wit, on the 4th of

December, 1861, made a wrongful and material statement or representation to the defendants that lot number 13 in the 7th concession of the township of Blenheim, in the county of Oxford, upon which the buildings mentioned were situated, was unencumbered, whereas in truth and in fact before and at the time of effecting such insurance the said land was encumbered by a certain mortgage made by the plaintiff to one Thomas Clark Street, bearing date the 1st day of June, 1857, for the sum of £94, and registered in the registry office of the said county of Oxford, on the 18th day of September, 1857, which said mortgage was at the time such insurance was effected and still is due and unpaid.

There was a second plea, which it is immaterial to mention, as it was demurred to and no judgment given on the demurrer.

To the first plea the plaintiff replied on equitable grounds, as follows: "That the defendant ought not to be admitted to say that the said land was encumbered, because he says that before the making of the said application or policy, and before and at the time of the making of the said mortgage, the plaintiff was agent for the said Thomas Clark Street, for certain rewards to him from the said Thomas Clark Street, and continued such agent up to the time of the said application and policy, on the terms and agreement that the moneys so to become due for such services should be applied towards payment of the said mortgage debt: that afterwards, and before the making of the said application or policy, the plaintiff also delivered to the said Thomas Clark Street a certain claim, demand, and debt the plaintiff had against a certain person in further part payment of the said mortgage debt, and the said Thomas Clark Street so accepted the same: that the moneys so earned by the said plaintiff as such agent, and the said claim, demand, and debt before and at the time of the said application and policy equalled the amount of the said mortgage debt and interest, and the said mortgage debt was then cancelled and paid, and the plaintiff entitled in equity to a release of the same, which release the said Thomas Clark Street was then and always since has been ready to release, and did not at the time of the said application or policy have a claim or any lien on the said land

by means of the said mortgage or otherwise: that thereupon, before the making of the said application, the defendants did deliver to the plaintiff a printed application for such insurance, and did thereby require the plaintiff to state that the plaintiff's title to the said land was by deed, and that the said lands were unencumbered, and did then thereby require the plaintiff to make the statements in his application in this replication set forth, wherefore the plaintiff did make such statement in his said application, and by the procurement of the defendants: that therefore the said statement was not false, fraudulent, or covinous. Wherefore the plaintiff prays judgment if the defendants ought to be admitted to say that the title of the plaintiff to the said land, and his interest therein, was incorrectly stated in said application or policy."

The defendants took issue on the equitable replication of the plaintiff to the defendants' first plea, and also demurred to the replication.

At the trial, at Woodstock, before *Richards, J.*, the plaintiff proved the loss by fire, and called *T. C. Street, Esquire*, the mortgagee. He proved that at the time the policy was made the plaintiff owed him about \$100 on the mortgage, after allowing him all the credit to which he was entitled; that if the plaintiff had asked for a release of the mortgage he would not have given it to him as a matter of right, though he might have done so as a matter of favour. The plaintiff offered evidence of the value of the land, but the learned judge refused to receive it. A nonsuit was ordered, but leave was reserved to the plaintiff to move to set aside the nonsuit, and to enter a verdict for the plaintiff for \$4,300, or such other sum as the court might direct.

*Beard* obtained a rule *nisi*, pursuant to leave reserved, during last term, to which

*Anderson* shewed cause.

*Freeman, Q. C.*, and *Beard* supported the rule, citing *Masters v. The Madison County Mutual Ins. Co.* 11 Barb. 624; *Arnould on Ins.* vol. i. 491, 522.

The demurrer was argued at the same time.

MCLEAN, C. J.—By the act 6 W. IV., ch. 18, sec. 17, (ch. 52, Consol. Stats. U. C., sec. 27,) it is enacted that “if the assured has a title in fee-simple unencumbered to the building or buildings insured, and to the land covered by the same, any policy of insurance thereon issued by the company, which is signed by the president, and countersigned by the secretary, shall be deemed valid and binding on the company, but not otherwise; but if the assured has a less estate therein, or if the premises be encumbered, the policy shall *be void*, unless the true title of the assured, and of the encumbrance on the premises, be expressed therein, and in the application therefor.”

The testimony of Mr. Street was so clear as to the existence of the mortgage mentioned in the defendants’ first plea at the time the insurance was effected that the learned judge could not do otherwise than nonsuit the plaintiff, or direct a verdict to be found against him. It was not a matter for the consideration of the jury whether the property was of sufficient value to be an ample security to Mr. Street, and also to the company for the premium notes. They would probably have found that it was sufficient for both, but the question was whether there was *any* encumbrance on it; how much or how little could not signify, because if there was *any*, and the true title of the assured and of the encumbrance on the premises were not expressed in the application, the policy by the section mentioned was declared to be void.

If at the time the insurance was effected the state of the title had been expressed in the application for insurance, the strong probability is that the encumbrance would have been considered so inconsiderable as not to interfere with the security which the company was entitled to for the premium notes, and that the risk would have been taken, but the company in such case would have a right to *reject* it, and if accepted the true state of the title and of the encumbrance would be expressed in the application.

The policy being actually *void* under the statute, and the equitable replication to the first plea, *supposing it to be good*, not being in any way supported or attempted to be supported

by evidence, it seems to me quite impossible for the plaintiff to sustain this action. The rule to set aside the nonsuit must therefore be discharged.

HAGARTY, J.—The defendants are a mutual insurance company, regulated by the statute, chapter 52, Consol. Stats. U. C., and the declaration shews that the plaintiff became a member and duly gave a deposit note.

Sec. 27 provides, “If the assured has a title in fee-simple unencumbered to the building or buildings insured, and to the land covered by the same, any policy of insurance thereon issued by the company, which is signed by the president,” &c., “shall be deemed valid and binding on the company, but not otherwise; but if the assured has a less estate therein, or if the premises be encumbered, the policy shall be void, unless the true title of the assured and of the encumbrance on the premises be expressed therein, and in the application therefor.”

By sec. 67 all the estate of assured at the time of insurance in the property stands pledged to the company, who may sell or mortgage the same to meet the liabilities of the assured for his proportion of any losses sustained.

I do not see how the learned judge at the trial could have done otherwise than direct a nonsuit. The evidence of Mr. Street clearly proved the plea, and brought the case within the act of Parliament, and thus avoided the policy altogether.

I see nothing in the equitable replication to help the plaintiff. I do not think that his counsel could seriously ask it to be treated as raising a valid estoppel, even if there could be such a bar to the positive words of the statute. The defendants are not charged with knowing anything of the plaintiff's position with Mr. Street, and their requiring him to state his title to be unencumbered, or giving him a printed form and telling him so to fill it up, or filling it up for him, cannot in any way that I can understand affect this defence.

Nor can the state of the account between mortgagor and mortgagee on an outstanding and unreleased mortgage in my judgment affect the question. When the insurance was

effected there was still a balance due to Street, and the plaintiff's title could not by any reasoning be considered to be unencumbered.

The replication raises no equity that I can see against the defendants; and if it did, on the face of its allegation of the mortgage being cancelled, &c., on demurrer, it was certainly not proved at the trial.

We would, in my opinion, refuse to give effect to the plain words of the statute if we should set aside the nonsuit.

As the nonsuit puts the plaintiff out of court on the facts, I do not think it necessary to discuss the demurrer at length. I think the equitable replication clearly bad.

I do not feel called upon to waste time on what under the circumstances would be a speculative examination of the second plea demurred to.

I think the rule must be discharged.

Rule discharged.

### CROOKS V. BOWES.

*Use and occupation—Former recovery in replevin by under-tenant of defendant against plaintiff—Estoppel—Pleading.*

To an action for use and occupation defendant pleaded, by way of estoppel, that one C. sued the plaintiff for taking his goods on the same premises: that the plaintiff avowed under a demise to the present defendant for twelve months' rent in arrear: that issue was taken on such avowry, and C. recovered judgment against the now plaintiff for £28, for such wrongful taking and costs: that C. was in possession at the time of said taking under and from the now defendant, and with his privity; and that the alleged arrears of rent distrained for was the same claim now made for use and occupation.

*Held*, on demurrer, plea bad as shewing no estoppel, for the judgment pleaded did not necessarily shew that no rent was due at the time of the distress mentioned, but might have been obtained on some other ground.

*Quære*, whether judgment in replevin could be a bar to an action for use and occupation.

*Quære*, also, whether defendant in this case could plead the judgment recovered by C. as an estoppel in his own favour.

To a count for use and occupation of a store, messuage, and land, the defendant pleaded in substance by way of estoppel, that on the 11th of September, 1858, one Charlesworth sued the plaintiff in replevin for taking and detaining his goods and chattels in a store on Wellington Street, in the city of Toronto, on the 4th of August, 1858: that the

plaintiff avowed the taking, &c., setting out in the avowry a demise of the premises in which, &c., from the plaintiff to the defendant, Bowes, at £200 a year, payable quarterly, on the first days of January, April, July, and October, in each year: that £108, 19s. 6d., balance of rent for one year, ending on the 1st of July, 1858, was in arrear, and the plaintiff took the same as a distress—praying a return, &c.: that the then plaintiff, Charlesworth, took issue on said avowry, and such proceedings were thereupon had that on the 12th of November, 1860, and before this suit commenced, Charlesworth recovered judgment against the now plaintiff for £28, 13s. 11d., as well for damages for the wrongful taking as for costs and charges, &c.: that the tenement in which said goods were taken was the same tenement mentioned in this declaration: that Charlesworth was in possession of and held the same at the time of said taking under and from the now defendant, and by and with his privity, and the alleged arrears of rent for which said distress was made is the same claim now made for use and occupation of the messuage in the declaration mentioned—concluding with the usual prayer of judgment.

To this plea the plaintiff demurred, on the ground that it does not appear therefrom and from the judgment that there was not any rent due at the time of the distress set forth: that rent may have been due; and that the plea raises no estoppel.

*Gwynne*, Q. C., and *Eccles*, Q. C., for the demurrer, objected to the issue joined in the former action as irregular or void, and on that point cited *Trent v. Hunt*, 9 Ex. 14; *Bullen and Leake* Prec. 466; C. L. P. Act, secs. 96, 114, 124, 133, 287; and on the estoppel, Com. Dig., Estoppel, B. 194, C. note s, E. 4; *Parry v. Duncan*, 7 Bing. 243; *Duchess of Kingston's Case*, Smith's Lea. Cas. vol. ii. 642; *Outram v. Morewood*, 3 East, 364; Co. Lit. 352 b.

*Richards*, Q. C., supported the plea, citing *Eastmure v. Lawes*, 5 Bing. N. C. 444; *Hitchin v. Campbell*, 2 Black, 830; Com. Dig. Testmoigne, A. S.; *Cleve v. Powel*, 1 M. & Rob. 228.

HAGARTY, J.—It seems to me that the plea is clearly insufficient to raise any estoppel in this suit. I have always understood that an estoppel should be clear and distinct in its necessary averments; and where it rests on a former recovery, it should shew that the very subject-matter now in dispute had been already positively adjudicated upon. In this plea there is nothing from which we can gather that the judgment was recovered on the ground that there was no rent in arrear. It is quite consistent with the failure of this avowry, that the finding against the avowant was on *non tenuit*, or some other point apart from the express issue of “*riens in arrere*.”

In Smith's Leading Cases, vol. ii., p. 443, it is said: “It is not necessary that the point on which it is sought to estop should have been *the only one in issue* on the previous occasion; it is enough if it be one which *must* have been decided. Nor will the verdict be admissible unless it appear clear that the same point actually was in issue. It is not sufficient that it *might have been so*.”

The plea before us merely gives a state of facts on which the question of rent, due or not due, may have arisen, but on which it is equally probable that no such question really did arise.

On this ground I think the demurrer must prevail.

Mr. Gwynne strongly urged that a replevin decision could not be an estoppel to an action for use and occupation, and he cited *Parry v. Duncan*, (7 Bing. 243.) In that case the facts are not fully given. The distress was off the demised premises. The jury found on *riens in arrere* in favour of the tenant. *Tindal*, C. J., says, “We should pause in discharging the rule if the consequence of our discharging it would be to deprive the defendant of all remedy for his rent. But he may still recover that, if it be due, in an action for use and occupation.”

I confess I was always under the impression that if it were properly and clearly averred that the question raised and determined on an avowry by a landlord was that a specific claim was for rent to a given time, and that this was found against him, it would be a bar to any future claim to

recover that sum. In the case in Bingham and many other replevins, the landlord may fail on the ground of distraining one or more days too soon, or from some other cause, and yet he would doubtless not be barred from recovering what he could shew to be justly due in a subsequent action for use and occupation.

I have great doubts whether the now defendant can plead the judgment in favour of Charlesworth as an estoppel for himself. He does not claim through Charlesworth, or under him, but only that Charlesworth was in possession under and from him, and with his privity.

In the work already cited, Smith's Lea. Cas., vol. ii. 442-3, the matter is discussed. It is said that "a verdict against feoffor would estop the feoffee; and against the lessor the lessee; *et sic de similibus*."

The position of Charlesworth is not very clearly defined in the plea before us, so as to enable us to understand his precise relation to the now defendant, Bowes, whether as tenant, care-taker, or servant, or whether the action was brought with Bowes' privity, or for him.

I do not pronounce an opinion on this point, as it is not necessary for the decision of this demurrer in favour of the plaintiff.

*Per cur.*—Judgment for plaintiff on demurrer.

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## STRANGE V. DILLON.

*Rule nisi—Grounds insufficiently stated—Chattel mortgage to secure advances.*

Several objections to the plaintiff's claim under a chattel mortgage were taken at the trial and overruled. A rule *nisi* was afterwards obtained for a new trial, on the ground that the mortgage, "together with the several renewals thereof, and the statements, papers, and affidavits to the same respectively attached, and all proceedings had and taken thereunder, are informal and irregular, and not according to the Consolidated Statutes of Upper Canada." *Held*, (affirming the judgment of the county court,) that the grounds of objection were insufficiently stated.

Where an agreement was entered into for advances to be made in sums and at times specified, and a mortgage taken to secure their repayment, *Held*, (also affirming the judgment below,) that a departure from the agreement in the times and manner of such advances could not alone defeat the mortgage, though it might be urged to the jury as against the *bona fides* of the transaction.

APPEAL from the county court of Frontenac, Lennox, and Addington.

This was an interpleader issue. The plaintiff claimed under a chattel mortgage from the execution debtor, to which fourteen objections were taken, and all except two overruled. A verdict was found for the plaintiff, and a rule *nisi* obtained for a nonsuit or new trial, "on the grounds that the said instrument or chattel mortgage produced at the trial of this cause, and under which the plaintiff claimed, together with the several renewals thereof, and the statements, papers, and affidavits to the same respectively attached, and all proceedings had and taken thereunder, are informal and irregular, and not according to the Consolidated Statutes of Upper Canada; that the advances made by the said plaintiff under the said mortgage, and during the currency thereof, and before its currency, were not made in accordance with its terms; that the said mortgage does not fully set forth, by recital or otherwise, the terms, nature, and effect of the agreement entered into between the parties thereto, and the amount of liability intended to be created; on the grounds of the objections taken at the trial, for the misdirection of the learned judge at the trial, for the rejection of material evidence; and on further grounds disclosed in affidavits and papers filed."

As to the two objections stated particularly in the rule, the facts appeared to be, that on the 20th of December, 1859, the plaintiff and the execution debtor, one Chester Stewart,

entered into an agreement by which Stewart was to deliver cordwood at certain places during the season of navigation in 1860, the plaintiff making advances to him not to exceed \$1 per cord, and amounting in all to \$2500: such advances to be in certain sums and at certain times specified. This agreement was recited in the mortgage in full; and it was further recited that the said Stewart had agreed to assign to the said Strange the property in question, two scows, as security for the repayment of the advances made or thereafter to be made in pursuance of the said above-recited agreement. The advances were made, though not at the precise times and in the manner mentioned in the agreement.

The rule was discharged in the court below, the learned judge holding that only the two objections above mentioned were sufficiently stated in the rule: that the agreement and the amount of liability were properly set forth in the mortgage; and that irregularity in making the advances, and a departure from the terms of the agreement, could form no ground for holding the mortgage void in form, though they might be submitted to a jury as evidence against the *bona fides* of the transaction and in support of fraud.

From this judgment the defendant appealed.

*Read*, Q. C., for the appellant, cited *Watson v. Lane*, 2 Jur. N. S. 119; *Montgomery v. Dean*, 7 C. P. 513; *Consol. Stats. U. C.*, ch. 45, sec. 5.

*G. L. Mowat*, contra.

HAGARTY, J.—The court below decided, on the plaintiff's objection, that the first and fourth grounds taken in the rule were insufficiently stated. This forms one of the grounds of appeal. I think the court was right in this view of the law, and that to hold otherwise would be to destroy and neutralise the operation of the excellent law requiring the grounds to be stated.

This case is a good example of the propriety of the new practice. Fourteen objections were taken at the trial, and on some at least the objectors could hardly have seriously relied. It would be wrong, I think, to permit a mere wholesale reference thereto to be sufficient in a rule to shew cause.

The same remarks may apply to the first objection to the mortgage, affidavits, and papers generally.

On the second and third objections, which were properly open to defendant, I am inclined to agree with the learned judge in holding them insufficient to defeat the plaintiff's recovery. Assuming a valid agreement for advances and a mortgage madethereon, I cannot see how a subsequent departure from the terms or manner of payment can alone defeat the security. It is of course always open to defendant to urge any such departure or variance as a circumstance telling against the *bona fides* and reality of the original security.

The third objection is one somewhat of fact, as to whether the mortgage fully recited the real agreement and amount of liability intended. There was a written agreement, and it is in terms recited in the mortgage. I see nothing in the evidence or the judge's remarks to induce me to think that the real agreement was not fully and truly recited.

In dismissing the appeal it is satisfactory to feel that in all human probability substantial justice has been done between the parties.

*Per cur*—Appeal dismissed with costs.

LYNCH ET AL., ADMINISTRATORS OF CONNELL JAMES BALDWIN, V. WILSON ET AL.

*Attorneys—Action for negligence—Pleading—Accord and satisfaction.*

The declaration charged that the plaintiffs had retained defendants as attorneys to prepare a deed of certain lands from him to one D., and a mortgage back to the plaintiff for £750, the balance of the purchase money, and to cause the mortgage to be duly registered within a reasonable time: that the defendants accepted such retainer, and promised to do the work, but neglected to register the mortgage for ten months, and until D. had executed a subsequent mortgage to other persons, which was recorded before that to the plaintiff.

- Defendants pleaded, 2. That the registrar was by law entitled to certain fees before recording any deed, as the plaintiff well knew, and that he never furnished them with any money to pay the same, "and so the defendants say that the said mortgage was not registered by the registrar or by the defendants for the default of the plaintiff, in not providing the defendants or said registrar with any sum of money to pay to the said registrar the fees allowed to him by law for registering the said mortgage."
3. That after breach the plaintiff accepted from D. another mortgage on other land of D., security to the plaintiff for £750, in full satisfaction and discharge of defendants' promise and all damages accrued to the plaintiff from the breach thereof.

*Held*, on demurrer, third plea good, it being no objection that the accord was by a third person, a stranger to the action.

*Per McLean*, C. J.—The second plea was bad, for, the retainer being admitted, the plaintiff's omission to furnish money formed no excuse, without notice to him that it was required, which defendants should have averred.

*Per Hagarty*, J.—The plea stated that the non-registration was caused by the plaintiff's neglect to furnish fees which he knew were necessary, and it therefore could not be held bad.

*Burns*, J., being absent and the court thus equally divided, no judgment was given on the demurrer to the second plea.

DECLARATION, for that in consideration that the plaintiffs retained the defendants as their attorneys and solicitors for reward to the defendants in that behalf, to prepare a deed of bargain and sale of certain lands in the county of Victoria from the plaintiff to one Terence Duignan, and an indenture of mortgage of the same lands back from the said Terence Duignan and wife to the plaintiff, to secure to the plaintiff the sum of £750, (being the balance of the purchase money of the said lands due by the said Terence Duignan to the plaintiff,) and to cause the said mortgage to be duly registered in the registry office of the said county of Victoria within a reasonable time thereafter, to perfect the said security; the defendants accepted the said retainer, and promised the plaintiff that they would use due and proper care, skill, and diligence about the premises, and would prepare the said deed and mortgage, and cause the

said mortgage to be registered within such reasonable time as aforesaid, to perfect the said security; yet the defendants did not use due and proper care and diligence in and about the execution of said retainer, but conducted themselves negligently and carelessly in the premises, in this, that although they, the said defendants, did prepare the said deed and mortgage, and the same were duly executed, yet they, the said defendants, did not within a reasonable time thereafter register or cause to be registered the said mortgage in the said county, but on the contrary thereof negligently and improperly allowed the same to remain unregistered for a long and unreasonable space of time, to wit, for ten calendar months thereafter, and until after the said Terence Duignan had made and executed a certain other indenture of mortgage on the said lands (subsequent in date to the said mortgage to the plaintiff) to certain persons, to wit, to Sidney Sanderson and Charles Leveridge, for the sum of £1447, which mortgage the said Sidney Sanderson and Charles Leveridge caused to be duly registered in the registry office of the said county of Victoria before the registration of the said mortgage to the plaintiff, and thereby the same became a lien and charge on said lands in favour of the said Sidney Sanderson and Charles Leveridge prior to the said mortgage to the plaintiff—whereby and by means of the negligent, careless, and improper conduct of the defendants in the premises, the said security became lost to the plaintiff, and the mortgage to him utterly worthless, and the plaintiff has thus been deprived of his said land and lost the purchase money thereof, and has also been put to and incurred great costs, charges, and expenses in and about the premises, and has been and is otherwise injured.

*Plea.*—1. Non assumpsit. 2. That by and under the provisions of the statutes of this province respecting the registry of deeds affecting real estate the registrar of every county, on the registry of any deed or conveyance affecting any lands in such county, is entitled to demand and receive from the person or persons registering any such deed or conveyance certain fees and reward for such registry before

the registry thereof, which the said Connell James Baldwin in his lifetime well knew; and the defendants say that the said Connell James Baldwin never did furnish or pay to the defendants any moneys whatever to pay the said registry fees to the registrar of the said county in which such lands were situated for the registry of the said mortgage of the said Terence Duignan; and so the defendants say that the said mortgage in the declaration mentioned was not registered by the registrar of the said county or by the defendants for the default of the said Connell James Baldwin, in not providing the defendants or the said registrar with any sum of money to pay to the said registrar the fees allowed to him by law for registering the said mortgage.

3. That after the making of the said promise in the declaration mentioned, and the breach thereof as in the declaration also mentioned, the said Connell James Baldwin accepted and received from the said Terence Duignan a certain other mortgage of the said Terence Duignan, upon certain real estate of the said Terence Duignan, in the town of Cobourg, security to the said Connell James Baldwin, for the sum of £750, in full satisfaction and discharge of the said promise of the defendants and all damages that had accrued to the said Connell James Baldwin from the breach thereof.

Demurrer to the second plea, on the grounds:—1. That the said second plea admits the retainer in the declaration alleged to prepare the deed and mortgage therein mentioned, and to cause the said mortgage to be registered within a reasonable time, and that the defendants entered upon the retainer and partially performed the same, yet the said plea shews no sufficient excuse for not completing the same or for neglecting to cause the said mortgage to be registered. 2. That it is not stated in said plea that the defendants notified the plaintiff that they would not proceed with the registration of the mortgage or cause the same to be registered till payment to them of the amount of the registration fees, nor that they required payment thereof, nor does it appear that the defendants in any way notified or requested the plaintiff to furnish or pay them any sum of money

for such registration fee or other disbursements, nor that the plaintiff knew that the defendants would not cause the said mortgage to be registered till payment to them of such money.

Demurrer to the third plea, on the grounds:—1. That the said third plea confesses the plaintiff's cause of action as set out in the declaration, yet shews no avoidance thereof or legal answer thereto. 2. That the accord and satisfaction therein attempted to be set up is by a third party, a stranger to the plaintiff and the defendants in this action, and is not a good bar. 3. That it does not appear that Terence Duignan, in the said third plea named, in giving to the plaintiff the other mortgage therein mentioned, acted by or at the request or with the knowledge of the defendants in any way, nor does it appear that the defendants and the said Terence Duignan stood in the relation of principal and agent, or in any other relation. 4. That it is not stated, nor does it appear, that the amount for which the said other mortgage was given as stated in the third plea was, or that any part thereof was, the same money or consideration for which the mortgage in the declaration mentioned was given, but for all that appears the said other mortgage might have been for a totally different consideration, and could therefore be no satisfaction in law.

The death of Connell James Baldwin after action brought, and appointment of the plaintiffs as administrators was suggested on the record.

*Robert A. Harrison*, for the demurrer, cited *Whitehead v. Lord*, 7 Ex. 491; *Jones v. Broadhurst*, 9 C. B. 173; *Edgcombe v. Rodd*, 5 East, 294, 330; *Grymes v. Blofield*, Cro. Eliz. 541; *Thurman v. Wild*, 11 A. & E. 453, 460; *Rowson v. Earle*, Moo. & Malk. 538; Com. Dig. "Accord" B. 1, 3; Bac. Ab. "Accord and Satisfaction," A.

*Cameron*, Q. C., contra, cited *Vansandau v. Browne*, 9 Bing. 402; *Belshaw v. Bush*, 11 C. B. 191; *Hoby v. Built*, 3 B. & Ad. 350; *Wadsworth v. Marshall*, 2 Cr. & J. 665.

McLEAN, C. J.—As to the second plea, setting up as a defence the default of the plaintiff in furnishing money to pay

the registrar's fees for recording the mortgage, I incline to think it is bad. The defendants admit a retainer amongst other things to get the mortgage recorded; then, being retained for that purpose, it is no excuse that no money was furnished to pay the fees, especially without any averment that notice was given to the plaintiff of money being required. I think such an allegation was necessary, and that if no such notice was given the defendants should not by their plea compel the plaintiff to reply in order to raise that very question, thereby lengthening the pleadings and making them more circuitous.

With regard to the third plea, for the reasons which my brother Hagarty will state, I concur with him in thinking that it must be held sufficient.

HAGARTY, J.—I think it impossible to consider the third plea bad, after the able review of all the cases by Sir *C. Cresswell*, in 9 C. B. 193, and the subsequent recognition of the correctness of his view.

Mr. Harrison after the argument very properly referred us to *Cuthbert v. Street*, (9 C. P. 115,) a case adverse to his position, where our own Court of Common Pleas acted on the same view as to satisfaction by a third person.

I think the defendants must have judgment on this plea.

The second plea presents a more difficult question. It avers that certain fees are payable to the registrar on recording a deed, which the plaintiff well knew, but that he never furnished or paid any money to defendants wherewith to pay these fees to the registrar; "*and so the defendants say that the said mortgage in the declaration mentioned was not registered by the registrar of said county, or by the defendants, for the default of the said Connell James Baldwin, in not providing the defendants or the said registrar with any sum of money to pay to the said registrar the fees allowed him by law for registering the said mortgage.*"

This is demurred to as substantially no defence, and for not averring any notice or request to the plaintiff to provide money for the fees, or that defendants would not register the mortgage till payment to them of the fees.

It was conceded on the argument that defendants would be compelled to prove at the trial either that they did request or notify the plaintiff to pay the fees, or that their retainer was qualified by the condition that he should advance money to pay them, or some facts from which it could be reasonably inferred that they did not absolutely accept the retainer to do the work and have the mortgage recorded without requiring any money from the plaintiff. But the defendants insist that their plea is *prima facie* sufficient: that if the plaintiff relies on want of request of money, or notice to him to furnish it, he should so reply.

Mr. Harrison contends that all this should appear in the plea to make it a good bar.

The authorities are clear enough as to what has to be proved: *Nicholls v. Wilson*, 11 M. & W. 106; *Whitehead v. Lord*, 7 Ex. 691; *Hoby v. Built*, 3 B. & Ad. 350; *Harris v. Osbourn*, 2 Cr. & M. 629; *Vansandau v. Browne*, 9 Bing. 402; *Rowson v. Earle*, 1 Moo. & Malk. 539; *Wadsworth v. Marshall*, 2 Cr. & J. 665. The whole question is one of pleading.

The plea in effect says: "There were fees to be paid to the registrar, as you well knew, and from your default in not finding money for these fees the mortgage was not registered."

The plaintiff can, doubtless, reply: "It was not my default, for you never told me that you wished or required me to advance the fees."

Must he thus reply, or can he refuse further allegation, and ask the court to say if defendants' answer, admitting it to be true, is sufficient?

I have felt, and still feel, very great hesitation on this point, and hardly see my way to an undoubting result.

On first reading the plea, I thought it clearly insufficient on the objection taken, but a further examination raises this difficulty:—

If the pleading stops as it does here, it stands admitted that it was by the plaintiff's default in not furnishing the fees, which he knew were necessary, the non-registration of the mortgage took place.

If the plaintiff had never been asked for money, or notified that it was required by his attorney, this allegation of the loss being caused by his default would not be true ; and the difficulty that now presses me is, that if I hold the plea bad I leave it admitted on the record that the loss in question happened by the plaintiff's default in not furnishing money, which he knew was required, for registering the mortgage.

As the day of special demurrers is said to have departed, I think it is not in accordance with the present practice of looking only to the substance of each allegation to hold the plea defective.

It is plausibly urged for the plea that it gives as a result or conclusion that the loss was occasioned by the plaintiff's default : that notice or request to him is merely an ingredient of the proposition, or evidence merely to be given to prove the same, not matter requiring to be averred.

On the whole, I am of opinion that I cannot hold the plea bad, and therefore that there must be judgment for defendants. I refer also, upon the question of pleading, to the *Company of Proprietors of the Cross Keys Bridge v. Rawlings*, 4 Bing. N. C. 71, and *Negelen v. Mitchell*, 7 M. & W. 618.

If the plaintiff has not already had leave to reply, he can have it now accorded to him in the usual way.

Judgment for defendants on demurrer to the third plea. No judgment given on demurrer to the second plea. (a)

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(a) See *Moore et al. v. Gurney et al.*, 21 U. C. R. 127.

THE COMMERCIAL BANK OF CANADA V. THE GREAT  
WESTERN RAILWAY COMPANY.

*Great Western R. W. Co.—Loan to Detroit and Milwaukee R. W. Co.—  
Money advanced by bankers for purposes beyond defendants' charter—  
Right to recover for overdrawn account—Evidence—Res gestæ.*

The Great Western Railway shareholders resolved in 1857 to advance £150,000 sterling to the Detroit and Milwaukee Railway Company, and again, in 1858, a further sum of £100,000 sterling. The first loan was expressly sanctioned by Parliament, and they also had parliamentary authority to use their funds "by way of loan or otherwise, in providing proper connections, and in promoting their traffic with railways in the United States." These two loans were to be expended by the managing and financial directors of the lenders. The latter applied to the plaintiffs, then being the bankers of the Great Western Railway, to advance money under these resolutions; all traffic receipts of the Detroit and Milwaukee Company to be deposited with the plaintiffs, and exchange on the Great Western Railway's London Board to be given monthly to cover any deficiency. The account was opened by the plaintiffs as "Detroit and Milwaukee Railway account, Great Western Railway," and kept distinct from the Great Western Railway account proper. Large advances were made and exchange drawn; the business was carried on for two years, and moneys advanced by the G. W. R. W. Co. to the D. & M. Co. beyond the amount of the two loans, the result being a large balance in favour of the plaintiffs. It was proved that of the two loans only about \$700,000 was paid to the plaintiffs by exchange or traffic receipts.

Difficulties arose, defendants insisting that credit was not given to them, but either to the D. & M. Co. or the individual directors negotiating the arrangement; and the plaintiffs sued for the balance overdrawn, amounting to about \$1,000,000. At the trial many objections were taken:—that credit was not given to defendants: that they could not be bound except under seal; and that all advances to the foreign company were *ultra vires*, as the plaintiffs well knew.

Leave was reserved to move for a nonsuit, and it was left to the jury to say (among other things) to whom credit was given, who reaped the benefit of the expenditure of this money, and whether the plaintiffs had any notice of the loans being exceeded. The jury found all these points in favour of the plaintiffs.

*Held*, that the plaintiffs as bankers could under the special circumstances recover, although there was no evidence of a debt under seal: that the objection of the advances being *ultra vires* could not prevail on the peculiar facts of the case: that it was a question of fact for the jury whose credit was actually pledged and to whom credit was given; and that there was evidence to support the finding for the plaintiffs.

*Held*, also, that it was sufficient to ask the jury whether the plaintiffs gave credit to defendants or to the D. & M. Co., without asking whether such credit was also accepted, for this with all the circumstances of the arrangement was included in the question.

The question whether defendants had "reaped the benefit" of the advances made by the plaintiffs was objected to as too vague, as they might have done this indirectly, by the increase of traffic on the D. & M. line, &c., without creating any legal liability; but *held*, unobjectionable.

B. & R. (defendants' managing and financial directors) wrote to the plaintiffs, asking for a credit of \$100,000 on their D. & M. account, which was considered on the 1st of April, 1858, at the plaintiffs' board and accepted by letter of their cashier on the same day. *Held*, that the minutes of the board were admissible for the plaintiffs, as part of the *res gestæ*.

*Held*, also, that a bank statement sent by the plaintiffs' agent at Hamilton to their head office, shewing how the account was kept, was properly admitted.

When it was proposed to open the account the plaintiffs' cashier met R., defendants' financial director, in Toronto, to discuss the matter, and made an arrangement, which it appeared R. was aware the cashier had to report to his board for approval, and which he told R. he had no doubt would be carried out. *Held*, that the cashier's verbal report to the plaintiffs' board on his return, two days after, was admissible as part of the *res gestæ*, as a declaration accompanying an act.

Defendants' secretary, called by the plaintiffs, produced copies of the proceedings of defendants' London Board, which he said had been sent by them to the board here as such copies, but which he could not prove otherwise to be so. *Held*, clearly sufficient.

A book containing a report of certain charges made by defendants' shareholder against the directors, and the reply of the latter, which had been sent out by the English to the Canadian Board, and circulated by the latter here, *Held*, also admissible, though of little importance to the case.

THIS was an action on the common counts, for money lent, money paid, &c., brought to recover the amount alleged to be overdrawn by the defendants in account with the plaintiffs, the sum claimed in the particulars being \$942,672·03, with interest from the 1st of December, 1859.

*Plea*, that the defendants are not indebted as alleged.

The main question was whether the purposes for, and the circumstances under which the money was obtained were such that the defendants by their charter were precluded from becoming liable; and next whether, if this objection did not exist, the debt had been so contracted as to enable the plaintiffs to recover against them as a corporation.

At the trial, at Kingston, in May, 1862, before *Burns, J.*, leave was reserved to move for a nonsuit on several legal objections taken, and certain questions were submitted to the jury, the bearing of which will sufficiently appear from the rule *nisi* afterwards obtained, and from the facts of the case as stated in the judgment.

The evidence before the court, both verbal and documentary, was extremely voluminous, covering more than 200 pages of print, and of such a nature, involving long correspondence and accounts, that a more extended statement would be impracticable within reasonable limits, and unnecessary for the purposes of this report.

The questions submitted were, first, to which company was the credit given by the bank: to the Great Western or

to the Detroit and Milwaukee Railway Company, or was the credit given upon the responsibility of Messrs. Brydges and Reynolds, (a) irrespective of either company?

Secondly, had Messrs. Brydges and Reynolds authority from the Great Western Company to make financial arrangements for the Detroit and Milwaukee Company on account of the Great Western Company to the extent of £250,000 sterling, agreed to be loaned by the Great Western Company to the Detroit and Milwaukee Company, and was the account of the Commercial Bank opened and conducted by them in pursuance of such authority?

Thirdly, had the Commercial Bank notice, at any time while the account was going on, that Messrs. Brydges and Reynolds had exceeded their authority, or that more than the two loans, amounting to £250,000 sterling, had been expended?

Fourthly, suppose the original credit was given by the bank to the Great Western Company on the opening of the account, was there any understood limitation between the parties as to the question of liability, at the time the letter of the 16th December, 1858, was given, either to the extent of the second loan of £100,000 sterling, or otherwise, or was the account continued on after that period in the same manner as before by the parties?

Fifthly, and lastly, did the Great Western Company, by its dealings with the Detroit and Milwaukee Company, reap the benefit of the expenditure made by the Commercial Bank on the Detroit and Milwaukee account?

The jury answered these questions as follows:—

First.—To the Great Western.

Second.—They had the authority, and the account was opened and conducted by them in pursuance of that authority.

Third.—The bank had no notice that Messrs. Brydges and Reynolds exceeded their authority.

Fourth.—There was no limitation, and the account was

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(a) These gentlemen were the managing and financial directors respectively of the defendants, and in January, 1858, became also president and vice-president of the Detroit and Milwaukee Company. See the judgment, page 253.

continued in the same manner as before the letter of the 16th December, 1858, was given.

Fifth.—They did.

A verdict was accordingly entered for the plaintiffs, subject to a reference as to the amount.

*Irving*, during Easter Term last, obtained a rule *nisi* calling on the plaintiffs to shew cause why the verdict should not be set aside, and a nonsuit entered, pursuant to leave reserved at the trial, on the points following:—

1. The papers and documents put in shew the claim to be for moneys advanced for the purposes of the Detroit and Milwaukee Railway Company, and the cheques on which the advances were made do not in any way indicate them to be on account of the defendants. From December, 1857, to December, 1858, and from December, 1858 to 1859, the cheques put in have engraved headings of the Detroit and Milwaukee Railway Company, and they purport to be signed by officers of that Company. The action having been opened upon an implied assumpsit for money lent, cannot be supported upon that kind of evidence.

2. The account put in shews that the charges for 1858 have all been met by payments after that period; and that after that time, that is, after the 16th December, 1858, the letter must be treated and looked upon as a guaranty, and should be sued on as such.

3. No action can be maintained on that letter—

1st. Because it is uncertain whether it covers past transactions, or extends to future advances; if past transactions, it is void as not containing a consideration on the face of it; if to cover past and future, it would also be void. (a)

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(a) This letter was as follows:—

“Great Western Railway,  
“Hamilton, Canada West,  
16th December, 1858.

“W. H. PARK, Esq.,  
Commercial Bank.

Dear Sir,

“With reference to the conversation which took place yesterday between you and Mr. Campbell and Mr. Reynolds upon the subject of the Detroit and Milwaukee Railway Company's account with the Com-

2nd. If applied to past transactions, the credits over-balance debits.

4. That Messrs. Brydges and Reynolds could not bind the defendants at all, even though under the formality of a seal, as they had no power to borrow money on behalf of the defendants for the present purpose, the plaintiffs being aware that it was for the Detroit and Milwaukee Railway Company that the money was required. See the Charter, 16 Vict., ch. 99; 18 Vict., ch. 176.

5. The act allowing the defendants to lend to the Detroit and Milwaukee Railway Company does not authorise a borrowing, and contemplates having the funds in hand before lending (22 Vict., ch. 116); and so the borrowing was *ultra vires*, and the plaintiffs being aiders in the illegal object of the borrowing cannot recover against the defendants.

Or why said verdict should not be set aside, and a new trial had between the parties, said verdict being contrary to law and evidence; for misdirection and want of direction on the part of the learned judge before whom the cause was tried; and for the reception of improper evidence; which said misdirection and want of direction consist—

*First.*—In the learned judge not directing the jury that the defendants, being a corporation, could not be bound by the verbal arrangements of Messrs. Brydges and Reynolds, their managing and financial directors, in matters beyond the ordinary and usual duties pertaining to those offices; and that those duties did not extend to borrowing money, or obtaining a banking credit, to be used for the benefit of a foreign railway company; and in leaving it as a question of fact for the jury to say whether credit was given by the

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mercial Bank, we beg leave to state that the Great Western Company holds itself liable to the Commercial Bank for all overdraft on the D. & M. Company's account with the said Bank.

"This is quite understood by us; but as you expressed a wish to have it placed on record, we now do so by means of this letter.

"Our D. & M. plans were so fully discussed between you and Mr. Reynolds yesterday that we do not deem it necessary to advert to them now.

"We are, dear Sir,

"Yours very truly,

"C. J. BRYDGES,

Managing Director, G. W. R. Co.

"THOS. REYNOLDS,

Finance Director, G. W. R. Co."

plaintiffs to the defendants, or to the Detroit and Milwaukee Railway Company, or to Messrs. Brydges and Reynolds individually, without making it part of the enquiry whether the credit was so accepted as well as given; and in not directing the jury that the mere circumstance of the plaintiffs giving credit to Messrs. Brydges and Reynolds, as the accredited agents of the defendants, would not affect the defendants, unless the said Brydges and Reynolds acted as and were in fact such agents, and so accepted the credit, and that a mistake on the part of the bank in this respect could not affect the defendants.

*Second.*—In not directing the jury that the authority given by the English Board of Directors to Messrs. Brydges and Reynolds was an authority simply to expend the moneys lent by the defendants to the Detroit and Milwaukee Railway Company, and to make arrangements with the creditors of that company for the settlement of their claims in such manner as to allow the loan authorised by the shareholders of the Great Western Railway Company to be made available for the purpose of completing the works of the Detroit and Milwaukee Company, as contemplated by the shareholders when they voted the loan; and in leaving it as a question of fact to the jury to say whether Messrs. Brydges and Reynolds had authority to make financial arrangements for the defendants under the evidence.

*Third.*—In not directing the jury that there was no evidence to sustain an action against the defendants for money lent to them, as the plaintiffs opened their cause of action to be, or to sustain the action on any other of the causes of action alleged in the declaration, the evidence establishing that all the moneys mentioned in and claimed by the bill of the plaintiffs' particulars, as lent to the defendants or paid on their account, were moneys paid from the 30th of December, 1857, to December, 1858, either on cheques drawn by C. J. Brydges and Thomas Reynolds, without any official designation whatever, and headed "Detroit and Milwaukee Account," or on the order of Thomas Reynolds alone, as vice-president of the Detroit and Milwaukee Company, to pay interest coupons on the bonds of that company, or to

retire the promissory notes and other obligations of that company, of which the said Brydges and Reynolds were from the 22nd of January, 1858, in fact respectively president and vice-president, and from December, 1858, to the end of December, 1859, either on cheques drawn by C. J. Brydges, as president, and Thomas Reynolds, as vice-president of the Detroit and Milwaukee Company, on the lithographed or engraved blanks of that company, countersigned by the secretary and accountant thereof, or on the order of the said Thomas Reynolds, as vice-president of that company, to pay interest coupons, or to retire notes and other obligations of that company; and the said learned judge should have charged the jury that moneys so paid were not moneys lent to the defendants or paid to their use.

*Fourth.*—In not directing the jury that the letter of Messieurs Brydges and Reynolds, of the 16th of December, 1858, put in evidence, was a document beyond the scope and authority of those gentlemen to give on behalf of the defendants, and not binding on the defendants: that that instrument was void as a guarantee disclosing no consideration, and leaving it in doubt whether past overdraft or future overdraft, or both, were intended to be guaranteed; also in not directing the jury that that letter was in law on its face a collateral and not a principal undertaking; and in failing to give the jury any directions as to the legal effect of that document, and in not directing that it would only extend and apply to the overdraft then existing, and not to advances made thereafter, and that that overdraft having been paid, as appeared by the plaintiffs' particulars, the liability under that letter was at an end; also in not directing the jury that, assuming that instrument to have been within the scope of the powers of the said Brydges and Reynolds, it must, by the terms thereof, govern the parties, and override all previous verbal arrangements, and that it in terms shewed that the plaintiffs and the writer of that instrument regarded the Detroit and Milwaukee Company as the principal debtor, and the defendants as sureties or guarantors only; and the action not having been brought on that letter must fail.

*Fifth.*—In submitting to the jury questions the finding on which could not provide the court with facts sufficient to determine the legal rights and positions of the parties, by applying the law to the case: that the finding on the first question, that credit was given to the defendants, would not, without finding further whether the money was received and used by the defendants, enable the court to decide whether the case comes within the authority of *Pim v. The Municipal Council of Ontario*, (9 C. P. 302,) or the class of cases where corporations are held liable on executed contracts though not under seal; and the question submitted with this question to the jury, whether the defendants “reaped the benefit” of the moneys advanced by the plaintiffs, was altogether too wide under the facts to enable the court to apply the law, it appearing from the evidence that the completion and efficient working of the Detroit and Milwaukee Railway benefited the defendants, as it increased their traffic, and rendered the security they held through their trustees, for the moneys advanced by them, more valuable; and so moneys expended towards the above object the defendants would reap the benefit of in one sense, but not in a sense to attach legal liability to them on a contract void for want of a seal, as bringing them within the class of cases above referred to, because the defendants did not at the time of the expenditure of the money own the works on which it was expended—they only held through trustees security for money actually advanced by the Detroit and Milwaukee Company, not embracing the sum claimed by the plaintiffs; the benefit of the expenditure was thus only incidental and collateral, and not direct, for on payment of the money secured to them they could not retain or hold any lien on the Detroit and Milwaukee Company for the moneys claimed in this action.

*Sixth.*—In not directing the jury what kind of benefit would be necessary to make the defendants liable, and in not expressly directing them that benefits resulting from an increased traffic and better security for the loan of the defendants to the Detroit and Milwaukee Company would not be the kind of benefit to make them liable, and in

leaving it to the jury as if such benefit would be sufficient to sustain this action against the defendants.

*Seventh.*—In not directing the jury that, assuming the directors in England had authorised Messrs. Brydges and Reynolds to obtain moneys from the plaintiffs to be used on the Detroit and Milwaukee Railway Company's works and business, such authority would be insufficient and void, as being beyond the power of the directors, not being authorised by the shareholders, and that the defendants could not be bound thereby; and in not directing that the expenditure of money by the defendants on the Detroit and Milwaukee Railway was a matter beyond the scope and power of the defendants, except to an extent authorised by a vote of the shareholders, and so illegal; and the lending of money by the plaintiffs to the defendants, or to their officers, for this purpose was illegal, and could not if actually received by the defendants be recovered by the lender; and in not directing that the power of the defendants was simply to use their funds, not to borrow, for the purpose of providing funds for the Detroit and Milwaukee Railway; and in not directing that the defendants could only borrow upon their bonds or other instrument under seal, and only for the purposes of their own railway.

And which said reception of improper evidence was as follows:—

1st. In allowing the minutes of the plaintiffs' board of directors, on the application of Messrs. Brydges and Reynolds for a credit of \$100,000 to be read: that application having been in writing, the interpretation put on it by the plaintiffs could not be material; and the minutes of their proceedings, not communicated in terms to the defendants, could in no manner be evidence for the plaintiffs against the defendants, and should not have been received.

2nd. In receiving the statement of directors of the plaintiffs' board as to what Mr. Ross, the plaintiffs' cashier, said as to what had taken place between him and Mr. Reynolds at the Rossin House, Toronto, when they arranged for opening the account, the subject of this action.

3rd. In allowing documents to be put in evidence as copies of the proceedings of the defendants' London Board

of Directors, without its appearing that such documents were in fact copies of the original proceedings—the only evidence of their being copies, or that there ever were such documents, being that of the defendants' secretary, that the said copies were sent to this country by the officers of the company in England as such copies, but whether they were copies or not he did not know.

4th. In allowing to be received in evidence certain charges made by a committee of the shareholders of the Great Western Railway Company against the directors of the company, and the management of its affairs, embracing, among other matters, its relation with the Detroit and Milwaukee Railway Company, and the reply of the directors thereto, and a letter of Mr. Brydges on the same subject.

5th. And in allowing to be received as evidence a certain writing, known as a bank statement, made by the manager of the branch bank, at Hamilton, for transmission to the head office of the plaintiffs, shewing how the plaintiffs had made certain entries in such statement of the Detroit and Milwaukee Railway Company's Account.

*Cameron, Q. C.*, (with him *Eccles, Q. C.*, *Galt, Q. C.*, and *Adam Crooks*.) shewed cause, and cited the following authorities upon the different points raised.

That the contract was not *ultra vires*. *Lindley on Partnership*, 199; *Ernest v. Nicholls*, 6 H. L. Cas. 401, S. C. 30 L. T. Rep. 45; *Hambro' v. The Hull and London Fire Insurance Co.*, 3 H. & N. 323; *The Royal British Bank v. Turquand*, 6 E. & B. 327; *Athenæum Life Assurance Society v. Pooley*, 3 De G. & J. 294; *Athenæum Life Assurance Society v. Pooley*, 5 Jur. N. S. 129.

That the benefit of the money expended was received by the defendants, and there was therefore no necessity under the circumstances for a contract under the corporate seal. *Ex parte Chippendale Re German Mining Co.*, 4 De G. McN. & G. 19; *Re The Norwich Yarn Company*, *Ex parte Bignold*, 22 Beav. 143, S. C. 27 L. T. Rep. 323; *Re The Magdalena Steam Navigation Co.*, 6 Jur. N. S. 975; *Re The Electric Telegraph Co. of Ireland*, (*Troup's case*.) 7 Jur. N. S. 901; *MacLae v. Sutherland*, 3 E. & B. 44; *Reuter v. The Elec-*

tric Telegraph Co., 6 E. & B. 341; Smith v. The Hull Glass Co., 11 C. B. 897; Prince of Wales Assurance Co. v. Harding, 1 E. B. & E. 209; Pim v. The Municipal Council of Ontario, 9 C. P. 302.

That if the defendants could be considered as agents only, they were agents for a foreign company, and therefore liable. Wilson v. Zulueta, 14 Q. B. 405; Addison on Contracts, 642.

That the minutes of the plaintiffs' board, and the verbal report of their cashier to them, were admissible as part of the *res gestæ*. Milne v. Leisler, 8 Jur. N. S. 122 Ex., S. C. 5 L. T. Rep. N. S. 802; Perkins v. Vaughan, 4 M. & G. 988.

That the "Red Book" was admissible, and sufficiently proved. James Watson's case, 32 Howell's State Trials, 82, 86, S. C. 2 Stark. N. P. C. 129.

*M. C. Cameron* (with him *Æmilius Irving* and *Roaf*) supported the rule, citing, to shew that the contract was *ultra vires*, the cases in 22 Beav. 143, 3 H. & N. 789, 5 Jur. N. S. 129, 6 H. L. Cas. 401, already cited on the other side; Balfour v. Ernest, 5 C. B. N. S. 601; MacGregor v. The Dover and Deal, &c., R. W. Co., 18 Q. B. 618; Kirk v. Bell, 16 Q. B. 290; East Anglian Railways Co. v. Eastern Counties R. W. Co., 11 C. B. 775; Gage v. Newmarket R. W. Co., 18 Q. B. 457; Bostock v. The North Staffordshire R. W. Co., 4 E. & B. 798; Mayor, &c., of Norwich v. Norfolk R. W. Co., 4 E. & B. 397; Colman v. Eastern Counties R. W. Co., 10 Beav. 15; Salomons v. Laing, 12 Beav. 352; Montreal Assurance Company v. McGillivray, 8 W. R. 165, 13 Moo. P. C. C. 87; Lyman v. The Bank of Upper Canada, 8 U. C. R. 304; Great Western R. W. Co. v. Preston and Berlin R. W. Co., 17 U. C. R. 477; Pearce v. The Madison and Indianapolis R. W. Co., and Peru and Indianapolis R. W. Co., 21 Howard, 442, (Supreme Court of the United States; ) Hood v. The New York and New Haven R. R. Co., 22 Connecticut Reports, 502; Regina v. Town Council of Lichfield, 4 Q. B. 894; Burmester v. Norris, 6 Ex. 796; King v. Gillett, 7 M. & W. 59; Hawtayne v. Browne, 7 M. & W. 595; Lindley on Partnership, 200, 202, 270.

That a contract under seal was necessary. *Pim v. Municipal Council of Ontario*, 9 C. P. 302; *Mayor, &c., of Ludlow v. Charlton*, 6 M. & W. 815; *Arnold v. Mayor, &c., of Poole*, 4 M. & G. 860; *Buffalo and Lake Huron R. W. Co. v. Whitehead*, 8 Grant Chy. Rep. U. C. 157; *Regina v. Mayor, &c., of Stamford*, 6 Q. B. 433; *London Dock Co. v. Sinnott*, 8 E. & B. 347; *Paine v. The Strand Union*, 8 Q. B. 326; *Stead v. Salt*, 3 Bing. 101; *Antram v. Chace*, 15 East, 209; *Adams v. Bankart*, 1 Cr. M. & R. 681.

That the defendants were not liable, but Messrs. Brydges and Reynolds personally. *Serrell v. Derbyshire, &c., R. W. Co.*, 9 C. B. 811; *Foster v. Geddes*, 14 U. C. R. 239; *Armour v. Gates*, 8 C. P. 548; *Boyd v. Cheney*, 5 C. P. 498; *Ferrie v. Jones*, 8 U. C. R. 192.

That the letter of the 16th December, 1858, could be construed only as a guarantee of the account of the Detroit and Milwaukee Company, which Messrs. Brydges and Reynolds had no authority to give, not as a primary obligation. *Brettel v. Williams*, 4 Ex. 623; *Duncan v. Lowndes*, 3 Camp. 478; *Hasleham v. Young*, 5 Q. B. 833; *French v. French*, 3 Scott, N. R. 121.

That though Messrs. Brydges and Reynolds might perhaps have made the defendants liable for goods furnished, they could not for money borrowed, as the master of a ship may pledge his vessel when in distress, or a wife may in certain cases make her husband responsible, or an infant become liable, for the one but not the other. *Knox v. Bushell*, 3 C. B. N. S. 334; *Beldon v. Campbell*, 6 Ex. 886; *Darby v. Boucher*, Salk. 279.

That notice to Messrs. Brydges and Reynolds, being directors, or knowledge by them that they were exceeding the defendants' powers, or doing wrong, could not affect the defendants as a corporation. *Hill v. The Manchester and Salford Waterworks Co.*, 3 B. & Ad. 866.

That Messrs. Brydges and Reynolds could not bind the defendants. *Lloyd v. Freshfield*, 2 C. & P. 325.

That the plaintiffs had been guilty of gross negligence in their mode of dealing with the defendants. *Ridley v. Taylor*, 13 East, 175.

As to the reception of evidence. *Marriage v. Lawrence*,

3 B. & Ad. 142; Brett v. Beales, M. & M. 416, S. C. 5 M. & R. 433.

HAGARTY, J.—It may be convenient to notice in the first place the resolutions of the court of proprietors of the Great Western Railway Company authorising the lending of money to the Detroit and Milwaukee Railway Company.

The first is of the London date, 8th October, 1857, and Hamilton date of 2nd November, 1857, and sanctions an “advance to the Detroit and Milwaukee Company of such an amount, not exceeding £150,000 sterling, as may be necessary to ensure the completion of the railway across Michigan, in connection with the Great Western Railway Company of Canada; such advance being made as a temporary loan, and on sufficient security, the expenditure of the same being subject to the control of the Great Western Railway Company.”

The second resolution, dated, respectively, London, 7th October, 1858, and Hamilton, 2nd November, 1858, authorises the board “to advance to the Detroit and Milwaukee Company a further sum of money, not exceeding £100,000 sterling, to be expended by and under the control of the Great Western Railway board of directors.”

The statute 22 Vict., ch. 116, sec. 11, allows the Great Western Railway “to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States,” when sanctioned by two-thirds of the shareholders, &c.; and enacts “that the loan of seven hundred and fifty thousand dollars already made by the said company to the Detroit and Milwaukee Railway Company is hereby declared to be lawful.”

A large portion of the argument for the defendants was directed against the legality of an employment of the means of the Great Western Railway Company in making or completing this foreign road;—and it was contended that in any event the defendants had no power to borrow money from third parties to effect such a purpose, and that the present plaintiffs, when they advanced the sums now sought to be recovered, had full notice of the alleged illegal destination of the money.

I think it well to dispose of this branch of the case first.

From August or September, 1857, down to the occurrence of the present difficulty, the plaintiffs had been the bankers of the defendants, and when the Detroit and Milwaukee account was first opened the resolution for the £150,000 was known to the plaintiffs.

The clause already cited of the act passed on the 16th of August, 1858, removed all questions of the legality of the first advance, and I presume is declaratory in its nature. It also prospectively gives full power to the Great Western Railway Company "to use its funds, by way of loan or otherwise, in providing proper connections, and in promoting its traffic with railways in the United States."

On the face of the second resolution, passed shortly after this statute, there is nothing to shew the special purpose of the £100,000 advance to the Detroit and Milwaukee Company. It is simply spoken of as "a further sum of money, to be expended by and under the control of the Great Western Railway board of directors."

The bankers of the Great Western Railway Company may be assumed to know that the Legislature had expressly sanctioned a very large loan to the foreign railway: that it had been really intended to be used, and was used, not merely in making connections and promoting traffic, but in constructing and equipping the line itself: that the road required further aid, and that Parliament allowed such aid for certain specified purposes: that the Great Western Railway Company had determined on a further advance of a lesser sum than that first loaned; and that the lenders were to have the actual expenditure of the money. Such money *might* very well be applied strictly within the words of the statute, though it may be safely assumed, from looking over the items of account, that large portions at least were applied in the general construction and equipment account, and in payment of debts due by the Detroit and Milwaukee Company. Among the exhibits in evidence I find a copy of a resolution of the English board of the 12th of October, 1858, stating that the second loan of £100,000 was granted specifically to provide rolling stock and station accommodation to the line of railway opened by the aid of the former grant. There seems to be

no evidence of this resolution, passed five days after the voting of the second loan, being made known to the plaintiffs.

I have a strong opinion that, independently of the express sanction of the first loan, the application of the Great Western Railway Company's moneys actually to construct and equip the Detroit and Milwaukee line was not within the plain meaning of this eleventh clause, and that any shareholder applying within a reasonable time to a Court of Equity could have restrained such a proceeding. The Legislature never could have contemplated, under such words as "providing proper connections, and in promoting its traffic with railways in the United States," that a Canadian company should apply its means towards the building of a road 187 miles long across the state of Michigan. But the end of the clause expressly legalises the loan already made, without any statement as to its object.

It is quite true that after the bankers had agreed to make advances, and as the drawing of the money from them proceeded, they might apprehend, from the nature of many of the payments made through them, that the money was being applied to questionable purposes. Forexample, many charges occur in the account before us for coupons of the Detroit and Milwaukee Company paid through the bank. Such payments might hardly come within the permissive words of the act, but we must consider the position of the parties, bankers, and customers. Having once agreed to make advances, without notice of any intended illegality, and aware that large sums might be required for perfectly allowable objects, it seems hardly consistent with our ideas of the requirements of business that we should hold the bankers or their clerks bound to scrutinise every cheque presented or every account directed to be paid, with a view of ascertaining if it came within the lawful powers of the customers' charter.

Being permitted to advance money to the foreign company for lawful purposes, it might well be that by some arrangement between the companies some of the moneys contracted to be expended in making connections, &c., might be handed back to the Great Western Railway Company to be applied by them in retiring a certain number of coupons, the foreign company in lieu thereof itself finding an equal

amount of funds to do the work first agreed to be done by the Great Western Railway Company.

Or, in another aspect of the case, it may be well to consider whether, in consequence of previous arrangements or advances with which the plaintiffs had no concern, the Detroit and Milwaukee Company had, as it were, fallen into the hands of the Great Western Railway Company, and the latter had the alternative either of completing the road or losing altogether the large sums already spent upon it. The court of proprietors of stock sanction a large advance to aid the foreign road: Parliament, after some delay, expressly sanction this advance, which is expended in endeavouring to complete the road: the shareholders consent to a further loan; and the bankers through whom the first loan is expended are applied to to furnish funds from time to time on the faith of this new vote. It seems to me that in such a case to decide against the bankers' right to be repaid their advances would be pushing the *ultra vires* doctrine further against third persons than it ever has been previously urged.

Or, again, if a railway company without parliamentary sanction, and even if liable to be restrained by equity on application of its own stockholders, as a matter of fact under the authority of a vote of the shareholders take possession by arrangement of a wholly independent line, and work it with their own funds and under their own officers, and make payments from day to day by cheque on their ordinary bankers, with whom their own proper account is kept, I hardly see my way to agree that the bankers are bound to enquire into the purpose for which each cheque is drawn, or, even with knowledge of what was going on, to be debarred the right of recovering a general balance on an overdrawn account because the moneys sought to be recovered went, in fact, to the maintenance of the other line.

We have not, however, to consider the equity of shareholders to restrain the application of corporate funds to a purpose foreign to the objects of the joint adventure. In such a case they must apply for relief with reasonable promptness, as early as practicable, to prevent the creation of new rights and obligations; and by unexplained delay they create, as has been said, a new equity against themselves

sufficient to bar their claim to relief. The law on this subject is well explained by Lord *Cottenham* in *Graham v. The Birkenhead and Lancashire, &c., Railway Company*, (2 MacN. & G. 156, 6 Eng. L. & E. Rep. 132,) and was before our Court of Common Pleas, in *Moore v. Chambers*, (11 C. P. 453.) By lying by and knowingly permitting his directors to expend their own money and moneys borrowed from others on a purpose to which he objects, the Great Western shareholder may bring himself within Lord *Cottenham's* words: "He has permitted things to get into that state which makes the injunction a proceeding not only not enforcing an equity, but calculated to inflict great hardship and injustice."

If therefore the individual shareholders may have lost their right to dispute their directors' proceedings, the case seems far stronger against allowing the corporation as a body to repudiate its own acts on the ground of any alleged illegality. It might be very different if they urged such an objection to a suit against them to compel them to perform, or for damages for not performing, an illegal or *ultra vires* contract. Here, having induced third persons to alter their position by advancing large moneys, they seek to urge it as a bar to their recovery, and to establish their own right to retain such moneys.

I cannot consider the advance of money by the plaintiffs for the purpose of assisting the Detroit and Milwaukee Company as analogous to the well-known class of cases where money is lent or given expressly for gambling, or stock-jobbing, or other objects declared illegal by statute, or for an immoral or unlawful purpose, such as *McKinnell v. Robinson*, (3 M. & W. 434,) and cases there cited. Here the Legislature had expressly sanctioned one loan to this foreign company, and had permitted loans of money to the same or any other United States road for certain purposes, and I cannot believe the law to be so rigid against parties actually advancing moneys to a company, that where the whole sum *may* be expended in a perfectly legal manner, it cannot be recovered because all or part *has* been expended on objects not warranted by the Legislature.

On this branch of the case the facts may not be unfairly stated thus: The Great Western Railway ask

their bankers to lend them money, alleging that they have resolved to help the foreign road to the extent of £100,000. The bankers look at the statute, and find them authorised so to do for certain purposes, such as "providing proper connections and promoting its traffic." If the diversion of any part of the Great Western Railway funds to aid a foreign road were unsanctioned by law, the defendants' objections would at once assume a more intelligible form. Desiring to preserve untouched the equity of shareholders to prevent any application of the common stock to purposes foreign to the common design, I think it would introduce infinite confusion and uncertainty in commercial dealings, and especially in the relations of banker and customer, to accept the defendants' view of the law in a case like the present.

It is also objected that, although power is given to the defendants to "use its funds" in the foreign company, yet they cannot legally *borrow* money from the plaintiffs for such purpose. A case can readily be supposed of the directors of a company, having expended all their authorised capital, not being authorised to borrow further means to carry on their adventure. *Burniester v. Norris*, (6 Ex. 796,) cited in the argument, is of that nature. *Alderson, B.*, says, "It would make a vast difference to the shareholders if the power contained in these words," (viz. that the directors should have sole control in managing the affairs and business of the company,) "were to be construed as imposing on them an unlimited responsibility beyond the capital which they supposed they would have to subscribe, and with which the concern was to be entirely carried on."

Here the act authorising the loan permits an increase of stock to the extent of two millions of pounds, and the creation of a debenture stock, and speaks (sec. 4) of the company's power to issue bonds for borrowed money "whenever it may be by them deemed expedient to avail themselves of the power of borrowing money by such means." The act of 1853, 16 Vict., ch. 99, sec. 3, gives the company power to borrow from time to time, for making, completing, and working the railway, and to make the bonds, &c., issued for securing payment of money so borrowed convertible into stock, &c.

In the *Bank of Australasia v. Breillat*, (6 Moore P. C. C. 152, 195,) Lord *Kingsdown*, in reference to the case of a public company under a deed of settlement containing no express borrowing powers, says, "We have no doubt at all that in ordinary banking partnerships the power of borrowing exists, and the directors by the terms of their appointment had all the general powers, and among the rest the power of borrowing, unless such power is excluded by other provisions of the deed.

In *Maclae v. Sutherland*, (3 E. & B. 38,) Lord *Campbell* cites this judgment with great approbation, and adds, "Although mere shareholders in a joint-stock company have no authority to pledge the credit of the company, the directors appointed to carry on the business would have impliedly such of the ordinary powers of partners in a common mercantile partnership as are necessary for the carrying on the business for which the company is formed; and, where a joint-stock banking company is established, the directors would be considered the agents of the shareholders to borrow money for the ordinary purposes of the business, and to give securities in the ordinary form for the money borrowed. He adds these suggestive words: "The shareholders may have been very ill-used by the directors, (who are acquitted of any personal misappropriation of the funds of the company,) although it is possible that they may, in common with themselves, have been under the delusive hope that enormous gains would be made from the speculations, . . . and that, all concerned being enriched, the engagements of the company would all be honourably fulfilled. But, whether the directors have misconducted themselves towards the shareholders or not, the loss that has accrued cannot, according to our views of the case, be thrown upon the *bonâ fide* creditors of the company."

I cannot doubt the applicability of this view of the law of joint-stock banking companies to a railway company. The latter is also a great trading corporation, in daily receipt and disbursement of large moneys, executing and maintaining costly works, often called on to disburse large sums, possibly at the moment beyond their available funds in hand. I think their directors must be held to possess all powers

necessary to obtain advances for their business purposes, either on loan or overdrawn account, from their bankers, and that the corporate body which they represent must be as such bound to repay.

I do not feel pressed by any difficulty suggested by defendants' counsel on this branch of the case. Assuming that the company had power to use its funds in aiding the Detroit and Milwaukee Company, I cannot draw any distinction between advances made by their bankers for this and for the general and legitimate purposes of the work; or, in other words, between the right of bankers to insist on repayment of defendants' overdrawn account for moneys expended on the foreign road and on the Great Western road itself, or for payment of the officers or work-people on the line. The evidence does not present the case of a formal borrowing of a specific sum or sums by way of loan, but the common case of a bank account largely overdrawn, instead of being covered by deposit of moneys or by proceeds of exchange.

I cannot understand any difficulty existing against the right of the bankers of any mercantile or trading company to enforce payment of any balance due them on an overdrawn account, arising in the course of ordinary business, because no bond had been given or document executed, as is usual in the case of a formal borrowing of specified sums.

We have now to consider the manner in which the evidence shews this heavy claim arose.

When the Great Western Railway Company decided on making the first loan to the Detroit and Milwaukee Company, it was expressly provided that the expenditure thereof should be subject to their own control. At this time Mr. Brydges was their managing director, and Mr. Reynolds their financial director. It seems clear that these two gentlemen had the authority of those advancing the money—that is, the shareholders—to control its expenditure. Mr. Brydges in his statement, (at page 86,) (a) and his co-director Mr. Becher, (at page 78,) are explicit as to this. The resolution of the English board, dated the 10th of November,

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(a) The pages referred to here and elsewhere in the judgment are those of a printed report of the evidence as taken at the trial, prepared by both parties to the suit and handed in to the court.

1857, directs that the expenditure shall be wholly under the control of Brydges and Reynolds. This at least is the light in which the matter is placed by the defendants at the trial.

As already remarked, the plaintiffs had been acting as the defendants' bankers from August or September, 1857, and it was on the 2nd of November of that year that the resolution for the first loan, having been passed in England, was adopted by the stockholders in Canada. Security was required by the form of the resolution.

After some negotiation, it appears that on the 1st of January, 1858, a mortgage was executed by the Detroit and Milwaukee Company, transferring to Messrs. Brydges, Reynolds, and Becher, as trustees, all the real and personal estate, vesting in them the control of the expenditure of the funds necessary to complete the line, and also the management of the railway and disposal of the net income, for assuring the repayment to the Great Western Railway Company of money advanced or to be advanced, with interest at ten per cent.

On the 22nd of January, 1858, Mr. Brydges became president and Mr. Reynolds vice-president of the Detroit and Milwaukee Railway Company, retaining however their respective official positions in the Great Western Railway Company; and the Detroit and Milwaukee board of directors was remodelled, by placing thereon two of the English board of the Great Western Railway, and one other of the Canadian Great Western Railway board, Mr. Becher, leaving only three American directors; and some \$2,500,000 of the Detroit and Milwaukee stock was transferred to the English Great Western Railway board.

On or about the 29th of December, 1857, the negotiation took place between Mr. Reynolds and Messrs. Ross and Park of the Commercial Bank, respecting which there is such a diversity of statement between the first gentleman and the other two, and on which I defer at present making any remark.

Mr. Reynolds, then being financial director of the Great Western Railway Company, informs the plaintiffs' cashier, Ross, of the £150,000 loan, and that he and Mr. Brydges were to superintend its expenditure. An account is proposed to be opened with the plaintiffs; and in Reynolds' own

words (page 74), "I asked him to allow us to open an account against which we could draw." . . . "I told him (page 67) that Mr. Brydges and myself would like to draw to the extent of our requirements in carrying out this undertaking of the Detroit and Milwaukee, and at the end of each month we would cover the amount by bills of exchange on England."

The fact seems to be clear, that these gentlemen procured an account to be opened: that they were to be allowed to draw as they required, paying into the plaintiffs' hands the receipts of the road; and agreed to cover the amount by monthly drafts on their English Great Western Railway Board.

Their first draft, of £6000, under this arrangement is dated 2nd of February, 1858, and is payable to the order of the plaintiffs' manager, (Park,) and is addressed "To the London Board of Directors of the Great Western Railway of Canada Company, Gresham House, Old Broad Street, London," who are directed to place the amount to the account of the trustees of the Detroit and Milwaukee Company; and the bill is signed "C. J. Brydges, Managing Director; Thomas Reynolds, Finance Director."

The transaction thus began; the plaintiffs to be repaid their advances by deposit of the receipts of the Detroit and Milwaukee Company, of which the chief Canadian directors of the defendants were president and vice-president, and by exchanges drawn on the defendants' London Board.

It may be convenient to notice here, that by the act already cited, 22 Vict., ch. 116, sec. 12, it is declared, after reciting that the defendants had a section of their board of directors in England, that the company has had and shall have power to establish an office in London "for the purpose of regulating and carrying on the business of issuing and transferring shares and bonds, and generally to do all matters and things necessary or desirable in regard to the transferring of or arrangements connected with the capital of the company held out of Canada, and that all such acts and proceedings shall be considered precisely the same as if carried on in the office of the company in Canada."

It may be well to bear this clause in mind in considering the position taken by the defendants at the trial—that the

Canadian directors as a board (of course excepting Brydges and Reynolds) took no part in the expenditure of these loans to the Detroit and Milwaukee Company.

The account being opened, it would seem from Mr. Reynolds' evidence, (page 67-8) that moneys were chequed out on cheques signed by Brydges and Reynolds, without any addition to their names, till the end of 1858, when printed cheques were used, and countersigned by the secretary and accountant of the Detroit and Milwaukee Company.

A reference to the voluminous particulars will exhibit the progress of the account and its ultimate result in the formidable balance claimed by the plaintiffs. The first exchange given on the defendants' London Board was on the 1st of February, 1858, and the last apparently about the 30th of December, 1858.

It would appear from defendants' evidence that the Great Western Railway Board in Hamilton (except Messrs. Reynolds and Brydges) took no part in this expenditure or dealing with the Detroit and Milwaukee Company, or in drawing the exchange on the London Board, except that when the drafts were accepted in England they came before the Canadian Board by way of return. (See Brydges' evidence, page 86.)

It may be considered as established beyond controversy, that the Great Western Railway Company resolved to advance two large loans to the Detroit and Milwaukee Company, on getting security, and on condition that their own managing and financial directors should wholly control the expenditure: that the required security was given, and the Detroit and Milwaukee Road and all its resources (subject to some prior claims) transferred to the two last-named gentlemen and Mr. Becher, their co-director, as trustees: that a new account was opened with the Great Western Railway bankers, and large advances obtained on the agreement that all receipts of the road were to be deposited with the bankers, and the amount behind-hand covered from time to time by sterling exchange drawn by the managing and financial directors as such on the defendants' London Board; and the final result is a very large balance in favour of the plaintiffs, for which this action is brought.

Before discussing the opposing views of the parties as to

whom credit was given to in this newly-opened account, I think it fitting to notice the objections of defendants' counsel as to the absence of any assent by defendants evidenced by their common seal to becoming the plaintiffs' debtors. This can best be considered under the assumption that the credit was sought and accorded as the plaintiffs' witnesses represent it, and that the bankers understood they were trusting the Great Western Railway Company, and that the latter acted throughout the dealings as if they considered themselves as responsible.

My very strong impression is that in such a case a liability may be contracted by the directors of a trading and commercial association like a railway company to their bankers, for the repayment of advances, without the formality of a seal. The current of modern authority seems clearly to run in that direction, and I think this court would be adopting a retrograde course were it to hold otherwise, and would be departing from the views of the law adopted by us in our own Court of Appeal, in the cases there decided, and of the English Queen's Bench in such cases as *Henderson v. The Australian Navigation Company*, (5 E. & B. 409,) and *Reuter v. The Electric Telegraph Company*, (6 E. & B. 341.) In the first-mentioned case *Wightman*, J., says, "The general result of the cases seems to be that, whenever the contract is made with relation to the purposes of the incorporation, it may, if the corporation be a trading one, be enforced, though not under seal." Sir *William Erle* says, "I cannot think that the magnitude or the insignificance of the contract is an element in deciding cases of this sort. . . . I think myself that it is most inexpedient that corporations should be able to hold out to persons dealing with them the semblance of a contract, and then repudiate it because not under seal." But it is not necessary to pursue this subject further. Our views have been so frequently and copiously expressed on this point, that I need only refer to *Pim v. The Municipal Council of Ontario*, (9 C. P. 304,) and *Whitehead v. The Buffalo and Lake Huron Railway Company*, (8 Chancery Reports, U. C. 157,) in the Court of Appeal for Upper Canada.

At the trial the only issue raised was never indebted, to

a declaration on the common money counts. After reservation of leave to move on the legal exceptions, certain questions were, after much discussion, submitted by the learned judge to the jury.

The most important was the first, as to whom the credit was given to by the plaintiffs—to the defendants, or to the Detroit and Milwaukee Company, or to Messrs. Brydges and Reynolds personally. The jury found this in favour of the plaintiffs, that in fact credit was given and the money advanced or lent by the bank to the Great Western Railway Company.

I do not see that this leading point of the case could be disposed of except as a matter of fact for the jury on the evidence.

I do not feel pressed with the exception taken to the form of the question, that it should have been “*accepted*” as well as given. In leaving such a common question to a jury, I understand the enquiry involves the whole circumstances of the bargain; and that in finding that credit was given to the Great Western Railway Company I must infer that the jury found such to be the true nature and effect of the dealing between the parties—namely, a pledging of credit and an agreement to accept such pledge, and to make advances accordingly.

Messrs. Park and Ross speak very decidedly as to their view of the agreement, and of their refusal to make advances on the credit of the Detroit and Milwaukee Company. Mr. Reynolds denies this view to be correct. Mr. Brydges adopts his colleague’s version so far as his personal knowledge is concerned; but I gather from a perusal of these gentlemen’s evidence that their idea would seem to have been that to the extent of the loan or loans voted by the shareholders they were to see the bank repaid.

The letter of the 16th of December, 1858, shortly after the voting of the second loan, and signed by them officially as managing and financial directors of the Great Western Railway Company, states expressly that the Great Western Railway Company “holds itself liable to the Commercial Bank for all overdraft on the Detroit and Milwaukee Company’s account with the said bank. This is quite understood by us: but as you expressed a wish to

have it placed on record, we now do so by means of this letter.”(a)

It is unnecessary to notice any of the arguments, at the trial or in term, as to the insufficiency of this letter as “a guarantee.” I only regard it as evidence of the parties’ own view of the state of the case when it was written.

I have no doubt whatever that in weighing the value of the opposing testimony it had much weight with the jury, when viewed in that light. Mr. Reynolds (at page 71) says that when he wrote that letter he supposed he was pledging the Great Western to the payment of the overdraft to the extent of the loan which he and Brydges were empowered to expend on the Detroit and Milwaukee Railway, and that at that date there was about \$385,000 due to the bank, and there was a sum of the loan (or loans?) remaining to be expended equal to the balance then due the bank. Again, (at page 75,) he repeats this—that the letter was written to give Campbell (the bank inspector) an assurance “that he would get the balance from the Great Western Railway’s unexpended portion of the loans.”

Mr. Brydges (at page 84) says the letter was never intended to make the Great Western Railway liable for an unlimited amount of advances; it was to assure them (the plaintiffs) that they would get the balance of the loan; and he adds that he thinks they did get as much as \$358,000, (*Qy.* \$385,000.)

Again, he says, (at page 87,) “Why it did not occur to me to make this letter different from what it was is, that at the time the second loan was granted we made out a statement, which was sent to London, shewing that at the end of 1859 it was expected that the Detroit and Milwaukee account would be about balanced. We were, however, disappointed in our expectations in regard to the traffic of the line. At the time the letter was written it was supposed that the unexpended portion of the £100,000 loan would suffice to balance the account. . . . We expected that the traffic of the line and the unexpended portion of the loan would make up the balance” (page 88).

The account from this time kept on constantly increasing,

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(a) This letter is given in full, ante, page 236, note (a).

and over \$358,000 (the balance above mentioned) was after that paid, as Mr. Brydges states, into the bank as part of the general account, but not on any particular arrangement on account of the overdraft existing at the date of the letter.

Mr. Brydges also states (page 90) that large sums were paid for coupons, old debts, &c., out of the loans, but he would not admit as much as £100,000. The whole amount of the loans was expended either in that way or in work on the road.

Mr. Reynolds (at page 69) states from a memorandum that \$709,850 of the two loans had been paid to the Commercial Bank. This in round numbers would seem to leave about £100,000 of the loans unpaid to the bank.

In the particulars of claim I only find one entry of credit for sterling exchange, amounting to \$48,166.66 on the 30th of December, 1858, after the granting of the second loan; and the account rapidly increases in favour of the bank from that time.

If the question of credit and liability were properly submitted to the jury, I cannot say that they had not evidence before them to warrant their finding in favour of the plaintiffs.

The defendants' counsel have argued with much force that assuming Messrs. Brydges and Reynolds to have in fact pledged the credit of defendants they had no right so to do, and could not thereby bind the corporation.

This again raises the old question as to how a corporation can be bound. I have already expressed an opinion on this point. This trading company must act through certain officers. They resolve to loan money to another company. That money has to be first obtained in England and then transmitted to Canada, to be there expended by certain officers of the lenders' company. Exchange has to be drawn for it, and these officers are appointed to draw such exchange. These officers inform the ordinary bankers of the company of all these facts, and propose and agree (as the jury have found) that if the bankers advance money to the company to be expended as aforesaid on the faith of this arrangement, they, the company's officers, will pay in all the earnings of the foreign company, and cover all

deficiencies by exchange drawn by them on London against the loan.

I am unable to see any sufficient reason for holding such an arrangement to be of no binding effect on the company.

If the facts be as the jury found, is it more than the common case of overdrawn accounts between bankers and corporation customers ?

If the London board had sent their manager and financial director to their London bankers with the resolutions, and with the authority above noticed, and on the faith thereof the bankers had given these gentlemen large cash advances, which the latter applied, as their directors had resolved they should do, to the work on the Detroit and Milwaukee line—in such case, in the absence of any express agreement as to the object of credit, could not such advances be recovered from the Great Western Railway Company ?

Again, if Messrs. Brydges and Reynolds, after communicating to the Commercial Bank in this country all that is proved to have been communicated by them, had drawn exchange on the London board, and obtained from the plaintiffs the proceeds thereof, and applied such proceeds according to their instructions on the Detroit and Milwaukee road, and such exchange had been dishonoured, would the Great Western Railway Company be responsible for the cash advanced as for money lent, apart from any formal liability on the bills of exchange as such ?

We know that corporate bodies are held liable for money had and received to the use of another, without evidence under seal: that they have been held responsible in trover and false imprisonment, and even for libel, on the acts of their officers, without seal. We know that under the winding-up acts, where money was shewn to have been borrowed by a company's secretary without authority, but was proved to have been actually expended on the company's business, it was allowed to the lender. *In re The Electric Telegraph Company of Ireland*, Troup's Case, (7 Jur. N. S. 901,) Hoare's case, (*Ib.*) Also, where a Life Assurance company entered into the Marine Assurance business, although their so doing was held to be *ultra vires*, *Wood, V. C.*, decreed a return of

the moneys paid to them for premiums for the void marine risks: *Re Phoenix Life Assurance Company*, Burgess and Stock's case (7 Law Times Rep., N. S. 191). He notices in his short judgment the paucity of direct authority on this subject.

It was asked by defendants' counsel on the argument whether the bank had or had not a claim for their advances against the Detroit and Milwaukee Company, or could the latter, if sued therefor, have successfully contended that the credit was exclusively given to the present defendants.

I have considered this suggestion, and feel some hesitation in speaking with any precise conclusion on the subject.

In 1860 a sale took place under a Chancery decree of the United States Circuit Court for the state of Michigan. Mr. Gray, a Detroit solicitor, proved that he acted in foreclosing the mortgage held by Messrs. Brydges, Reynolds, and Becher, on the Detroit and Milwaukee road: that on the 6th of August, 1860, an agreement, proved at the trial, was made, (see page 89,) reciting that defendants' (the Detroit and Milwaukee Company's) counsel had consented to a sale, and that the trustees above named (who were plaintiffs) agreed with Mr. A. Campbell, as trustee for the Commercial Bank, that the plaintiffs might bid in the property, and that a new corporation under the laws of Michigan should be formed, succeeding to all the property and franchises of the old company: that a seven per cent. preferred stock in the new company should be issued to the amount of the debts mentioned in a schedule annexed—the new corporation to pay such debts at periods named: that if the plaintiffs or the new corporation should not pay as agreed the decree might be vacated and held for nought, and that the trustee might interpose and recover said debts, and take all proceedings against all persons or corporations liable as if the decree had not been entered; and declaring that such agreement or any proceedings thereon should not be considered as an election of the remedies of the bank for said debt, but as a means of payment and a proceeding solely collateral.

In the schedule a debt of \$1,039,203, 98c. is set down, which I understand to be the then claim of the Commercial Bank.

The road was sold, and bought in by the trustees, Brydges, Reynolds, and Becher.

Mr. Campbell was inspector for the Commercial Bank. Mr. Ross says that he (Campbell) took this course thinking it best for the bank: that nothing was done by the board thereon then or since.

Of course it can only be on the assumption that the Great Western Railway Company were the principal (if not the only) debtors of the bank for these advances that the latter can recover. Their position is incompatible with any idea of the defendants being only secondarily liable, or as sureties for the Detroit and Milwaukee Company. I do not feel that because a claim could be successfully urged, or a proof be allowed in bankruptcy, against the Detroit and Milwaukee Company, we must necessarily conclude that the Great Western Railway Company are not therefore the principal debtors. Embarrassing questions may be raised by such a suggestion; but I cannot find that any such can prevent its becoming properly a question of fact as to whom the credit was given to, and to whom was the plaintiffs' money actually lent, and by whom was it to be repaid.

The plaintiffs' position is, that from the beginning the credit was given by them to the Great Western Railway Company: the latter insist that it was given to the Detroit and Milwaukee Company; and the manner in which the accounts were kept is much discussed.

It is quite clear that from the beginning it was understood and agreed on both sides that the new account should be kept distinct from that of the Great Western Railway proper. The reason for this was obvious, and does not of itself afford any clear argument for or against the present claim. The groundwork of defendants' proposal to the plaintiffs for advances was the resolution to advance a specific sum to the Detroit and Milwaukee Company, to be expended by Brydges and Reynolds, and of course such expenditure must be kept distinct from their own proper accounts for their own stockholders with their bankers. So with the proposed manner of meeting the bank's advances—namely, payment of the Detroit and Milwaukee Company's receipts, and sterling exchange on the London Board on account of the loan.

This arrangement, on which there is no controversy, necessitated a distinct keeping of the accounts.

The plaintiffs allege that to keep the defendants' liability in view the account was opened and continued in their books as "*Detroit and Milwaukee Railway Company account—Great Western Railway.*"

A vast mass of cheques, bills, notes, letters, and documents of all kinds is produced from the very extensive dealings of the parties, extending over two or three years. So long as no difficulty was apprehended between the parties there was little care apparently taken in adhering to any special or formal headings of documents, or additions to official signatures. Once it was settled that the two accounts were to be distinctly kept, it is easy to produce any number of documents from which it could be readily gathered that the Detroit and Milwaukee Company were the debtors of the bank, and on which the actual liability of any other person or body would not appear.

Each of the litigants can produce numberless letters and papers to which signatures are attached simply in the individual names of the writers, or with such names followed by an official designation, just as each may desire to draw an argument from the absence or presence of such an addition. Thus notes were taken in large amounts from the Detroit and Milwaukee Company; bonds were given in certain financial emergencies under the seal of the Great Western Railway Company; in short, whatever document or obligation seemed best calculated to obtain credit or raise money was readily resorted to.

A very careful perusal of all the mass of papers induces me to attach a far less degree of importance to these matters than they possibly have attained in the minds of the very able and zealous advocates of the parties.

Some of the strongest of the letters relied on by the defendants are to be found under dates long subsequent to the often-quoted letter of acknowledgment of the 16th of December, 1858, when the plaintiffs had pointedly obtained from Brydges and Reynolds the admission of the Great Western Railway Company's liability.

I may instance such letters as that of Sorley, the bank accountant, addressed to the Vice-President of the Detroit and Milwaukee Company, (Reynolds,) asking him for a certificate "of the balance due this bank by your company on account as on the 10th instant." This is on the 14th of October, 1859. Again, the letter of Mr. Park of the 10th of November, 1859, referring to the \$200,000, "special loan by this bank to the Detroit and Milwaukee Railway Company," and asking for renewals of the notes given therefor, "the bonds of the Great Western Railway for an equal amount being still held by us as collateral until the bill or bills are paid;" and a similar letter of the 15th of the same month.

Something was said, and more was hinted, as to parties connected with the bank having had dealings, either personally or for others, in the Detroit and Milwaukee Company's securities, which were in the market at very heavy discount; and possibly this may account for some of the very lively interest evinced by some of the writers of the letters in evidence, as to the standing, credit, and prospects of this company.

I attach much higher importance to the communications between the parties at or about the time when the account was first opened, and while the origin and true bearing of the agreement were most fresh in the recollection of all parties.

The dealing commenced about the 29th of December, 1857, and depends, firstly, on the verbal testimony already noticed.

Within a few days of this, Messrs. Brydges and Reynolds went to New York, to arrange with certain creditors of the Detroit and Milwaukee Company there. On their return they write a letter to Mr. Ross, dated January 11th, 1858, signed by them as managing and financial directors of the Great Western Railway, asking the bank to guarantee certain bills, which they say they had given to Rayner & Clarke, for a claim on the Detroit and Milwaukee Company, which they had settled, they say, "by giving our acceptance of Mr. Trowbridge's drafts on this company," (the Great Western Railway,) setting out the amounts, "each being dated from

Detroit, 8th December, 1857, signed by C. C. Trowbridge, treasurer of the Detroit and Milwaukee Company, and accepted by us as managing and financial directors, respectively, of the Great Western of Canada Company."

I quote this as illustrating the then understanding of the parties, and suggestive of the question whether the bank, having paid the bills at maturity, would on this letter have naturally looked to the Great Western Railway Company for repayment, or to the Detroit and Milwaukee Company, or to Messrs. Brydges and Reynolds personally?

Shortly after, on the 30th of March, 1858, the letter of Brydges and Reynolds is written to Ross, requesting the credit of \$100,000, if required, "on our joint Detroit and Milwaukee account here," stating that "the balance against the Great Western Company is now so much reduced, (and will continue steadily to decrease,) that we imagine you will have no objection to the arrangement here proposed. . . . We desire to adhere as nearly as we can, in drawing on our English colleagues, to the amount set down in the schedule we prepared for the gradual completion of the works on the Detroit and Milwaukee line; and this proposed credit would enable us to do so without the necessity of postponing claims which could, if promptly settled, be much more satisfactorily arranged;" and they ask this to be submitted to the bank board.

On the 1st of April, 1858, two days after, Mr. Ross answers this favourably, "under the impression that any amount on the Detroit and Milwaukee account not covered by bill at the end of each month will be (practically) neutralized by a corresponding reduction of general account, under the limit of £50,000, . . . that on the 1st of December next the Detroit and Milwaukee account shall be covered in full by exchange or cash. . . . We assume that the aggregate amount of the Detroit and Milwaukee account uncovered at each month's end, and of the general account, will not exceed \$200,000; but in case of emergency we shall not mind an excess of \$25 to \$40,000 for a short time." This is addressed to Brydges and Reynolds, directors of the Great Western Railway. The latter answer this letter on the 14th of April, agreeing to the conditions, except as to

the 1st of December limit: "We have every expectation that within six months from this date the Great Western account will be in a condition not to require the open credit which it at present enjoys; and if this expectation should be realized, we presume there would be no objection on the part of the bank to carry the Detroit and Milwaukee credit on to the 31st of March next."

This correspondence, so shortly following the opening of the account, and before any difficulty seems to have been anticipated, is valuable for ascertaining what the parties themselves seemed to understand of their respective positions. It certainly is not without great weight towards supporting the plaintiffs' view, that they and Messrs. Brydges and Reynolds then considered that the dealing was directly between the Commercial Bank and the Great Western Railway Company.

At a much later date, on the 25th and 28th of May, 1859, we find letters and statements written by Messrs. Brydges and Reynolds to the bank, which are important as shewing the manner in which the accounts of the two companies are referred to, the liabilities and the net receipts of each, excusing the not giving of sterling exchange, and in the last letter enclosing the notes of the Detroit and Milwaukee Company for large amounts, and Great Western Railway bonds, to be used by Ross in New York as collateral security in endeavouring to raise money on the Detroit and Milwaukee notes. The bank were to get the proceeds of the notes to provide funds in lieu of the sterling exchange which Messrs. Brydges and Reynolds could not then provide.

It is necessary here to notice the argument that Messrs. Brydges and Reynolds personally were those to whom the plaintiffs gave credit when the account was first opened.

I hardly understand the evidence of these gentlemen as leading to that conclusion. Mr. Reynolds says (at page 73), "We opened an account in our joint names as individuals;" and in answer to the question, "Was it not for the Great Western Railway?" "It was in pursuance of the instructions to expend the money. . . . It was an interim arrangement for the purpose of aiding us in carrying out the instructions on account of the Detroit and Milwaukee Railway Company.

. . . We opened the account and made the arrangements with Mr. Ross purely on our own responsibility: we had no instructions whatever to do so for the Great Western Railway Company. To the question, "But was it your own transaction, your own speculation?" *Answer.* "Certainly not." To the question, "Was it the Great Western Railway's business?" *Answer.* "It was the Great Western Railway's business to find the money, but it was our business to spend it."

Mr. Brydges, after denying any authority from the Great Western Railway shareholders to incur liability on their account, (at page 86,) to the question, "How did you look upon the matter yourself—that you were opening an account on behalf of the Great Western, the Detroit and Milwaukee Company, or yourselves?" answers, "Certainly not the Great Western." On this answer of Mr. Brydges, this question suggests itself to me, Could he carry out his instructions to draw the amount of the loans from England except by exchange, which he must negotiate with parties here, receiving from them the cash proceeds? His directors do not argue that they could repudiate his exchange on them drawn with their sanction. I hardly see, if so, how the cash so given or advanced by bankers discounting the drafts to the company's officers can be looked upon as lent to those officers on their personal credit. It would more naturally seem to be advanced on the credit of the bills being duly honoured by the drawees.

I do not think that on the evidence it can fairly be considered that the credit was given to these gentlemen individually, whatever might be their personal liability (as Mr. Reynolds suggests) if their acts had been repudiated by their principals.

The jury, on this question being left to them, negatived, as I think justly, such a conclusion.

It is almost impossible to comment in full on all the evidence and documents submitted. I must content myself with having noticed what seem to me to be the prominent features of the case.

I will now examine the objections taken to the admission of evidence:—

First, in allowing the minutes of the plaintiffs' board of directors to be read on the application of Brydges and Reynolds for the \$100,000 credit. This minute is of the same date, the 1st of April, 1858, with the plaintiffs' letter in reply to the application already noticed. The only material difference between the minute and the letter is, that the former speaks of the "application from the Great Western Railway Co. for a credit of \$100,000 on their Detroit and Milwaukee account" as considered by the board; and again, "the understanding being that the aggregate amount of the two accounts of the Great Western Railway Company will not exceed £50,000 to £60,000 Cy."

It appears to me that this minute was properly received in evidence as part of the transaction, and that the tendency of modern decisions is clearly in favour of admitting proof of all things done by parties at the time of entering into a contract, to prove their respective understandings of it.

The case in the Exchequer of *Milne v. Leisler* (5 L. T. Rep. N. S. 802) strongly illustrates this. The point was this: A. applies to B. to purchase goods, representing, as B. contends, that he was buying on account of G. and M.: A. swears that he bought on his own account, and that he intended to ship through G. and M., and would probably pay by their acceptance. The day after the bargain B. writes to his Liverpool agents to enquire as to the standing of G. and M., and stating that A. was making a large purchase of goods for them. This letter was held to be properly receivable as part of the *res gestæ*, and the decision has I think a strong bearing on this and also on the second and fifth objections urged by defendants.

This fifth objection points to the allowance of the document called a bank statement, sent by the plaintiffs' Hamilton agent to the head office at Kingston, shewing how the account was kept. I see no valid objection to this.

I feel more doubt on the second objection, to the admission of the evidence of the bank directors of what their cashier, Ross, had reported to them as to what had taken place between him and Reynolds in Toronto when the arrangement was made for opening the account.

In the case last cited *Pollock*, C. B., says, "It is certain

that a mere statement, as when a person returns, for instance, from the Exchange to his counting-house, and says, 'I have sold such and such things,' that would not be evidence of the fact."

But in the present case we have to consider the position of the parties. A very serious contract is under discussion between Reynolds and the cashier Ross. The latter was not dealing for himself, but, as all parties well knew, as the agent of a corporate body, with a board of directors who could either sanction or repudiate his acts, and to whom he would have to report his proceedings for approval.

On looking back to the evidence, it may be truly said that it amounts to very little, and can hardly have weighed seriously with the jury.

Three directors were examined. Dr. Robertson's evidence is quite unimportant: he says nothing on the disputed point. Mr. Strange's testimony merely amounts to this, that, as he supposed, the directors sanctioned a loan to the Great Western Railway Company. Mr. A. J. Macdonell's evidence seems alone open to the objections urged. He states, in substance, that Mr. Ross usually reports all important matters to the board for approval; and that on his return from Toronto, after the interview, he reported that credit was to be given to the 'Great Western Railway Company; and that the board would never have consented to giving a credit to the Detroit and Milwaukee Company, and that he never heard that such a thing had been asked. But, on further examination, Mr. Macdonell evidently could not remember any distinct report made to the board, or discussion of the matter on Ross's return, and the impression left on my mind from perusing his answer is, that it is uncertain whether he heard this from Ross in the form of a report to the board, or on one of the occasions of which he speaks: "Sometimes (page 57) I am not present at the board meetings, but I have conversations with Mr. Ross on the affairs of the bank almost daily;" and to the question, on cross-examination, "Have you any very distinct recollection of this matter being discussed when Mr. Ross returned?" he replies, "There were so many things submitted that I cannot remember it very distinctly."

I think this evidence cannot be upheld except on the principle of a report or return made by an officer or cashier of a public company in the course of his duty to his superiors, with whom lay the power of approval or disapproval of his acts. Mr. Macdonell's evidence very faintly, if at all, places it in this light. I presume he and his co-directors could be properly examined to prove that they as directors never sanctioned or heard of any proposition to lend money to the Detroit and Milwaukee Company, or to any other but the Great Western Railway Company, and it is a step very slightly in advance of this to state that from their cashier's report to them they understood the matter in that light.

If at the time of the negotiation between Ross and Reynolds it was an understanding of the parties that the proposed credit (to whomsoever given) should be referred to the Commercial Bank board, it will naturally seem that Ross's carrying out such understanding would be fairly considered as part of the *res gestæ*.

In Ross's evidence, on cross-examination, (page 38,) he is asked thus: "It seems to have been understood between these gentlemen that a reference of these matters to the board was necessary before any definite arrangement could be made. You could not of yourself grant a credit to Messrs. Brydges and Reynolds without a reference to your board?" *Answer*. "I was in the habit of referring matters of consequence to the board, for the sake of advising with the directors upon them."

Again, at page 39, "Did you lay the schedule before the board?" *Answer*. "Not that I remember. . . . I explained the matter to the board, and in the minutes of the 31st of December there is an allusion to it. . . . I told Mr. Reynolds I had no doubt that the arrangement would be carried out."

It would thus appear that Ross would be by all parties naturally intended to report all this to his board for approval to complete the transaction, and therefore I have come to the conclusion, not however without some hesitation, that as part of the *res gestæ*, as "a declaration accompanying an act," his report to his directors was admissible. See Starkie on Evidence, 52-3.

I desire to adopt the most liberal construction of the rules of evidence. Infinite mischief has been done for generations by errors on the opposite side. I think that, as the law is now administered we are safe in adopting the less stringent rule. I repeat, however, that I attach but slight importance to the evidence now objected to, and can hardly believe that its reception in any way whatever influenced the result.

The third objection to evidence is as to receiving the copies of the proceedings of the Great Western Railway London Board, without its appearing that such documents were in fact copies of the original proceedings: "the only evidence of there being copies, or that there ever were such documents, being that of defendants' secretary, that said copies were sent to this country by the officers of the company in England as such copies, but whether they were copies or not he did not know."

I think the objection stated in the rule gives its own answer in the words above quoted. The secretary of the directors here proves the official receipt of such documents by the Canadian board, to be treated by them as official and authoritative. I should be sorry that such a mode of proof could be found to be objectionable.

The last objection to evidence requiring notice is number 4, as to the admissibility of what was called the "Red Book," of charges against and answers by the directors of the Great Western Railway.

In my view of the case I attach little or no importance whatever to this book or its contents. On the evidence of Messrs. Muir and Stephens (at pages 47 and 48) it is shewn that these red books were sent out by the English Board to the Canadian Board. Mr. Stephens, the defendants' secretary, says they were circulated here when received among the shareholders as the report of the company, and he points to minutes of the board here bearing on the subject of this report. I think it was fairly receivable in evidence, as a document adopted and circulated by the defendants' board here.

I therefore think that there is no ground for a new trial for the reception of improper evidence. I have already stated my views as to the various legal exceptions taken

against the maintenance of the action, and I think they apply to nearly all the voluminous objections in the rule to shew cause.

Before summing up my views I should perhaps notice the objection to one of the questions submitted to the jury: namely, as to the Great Western Company "reaping the benefit" of the expenditure of the plaintiffs' money on the Detroit and Milwaukee line.

It is said that such a question was too vague and general. If the question were proper in any shape, it is not easy to see how it could be framed in a less objectionable form.

The decision at which I have arrived does not depend upon the finding of the jury on that point, and would be the same had such a question been omitted from those submitted to them.

It is needless to premise that in a matter so complicated as this has become, in the dealings between these companies, and in the rather unsettled state of the law for many years past as to the rights and powers of corporations to contract otherwise than under seal, an opinion formed on the points submitted for our judgment can hardly be delivered without some hesitation.

On the best consideration that I have been able to give to the case, I have arrived at the following conclusions:—

That the first loan of £150,000 sterling to the Detroit and Milwaukee Company, was sanctioned by the subsequent act of Parliament, and declared in express terms to be valid:

That as to the second loan, of £100,000 sterling, there was nothing on the face of the resolution to shew that it was to be expended in a manner contrary to law:

That on the faith of these resolutions, and of the arrangements made by the two managing directors of defendants, the Commercial Bank agreed to open the account which they call "The Detroit and Milwaukee Railway account, Great Western Railway:" that they, then and previously being the general bankers of the Great Western Railway, continued to advance large moneys on this account; and the mode by which they were to be repaid such advances was by paying into them all the traffic receipts of the Detroit and

Milwaukee Company, and covering the deficiency from time to time by drafts, in sterling exchange, drawn by the Great Western Railway officers here on the then English Board :

That of the two loans, of £250,000, they, in fact, have only received about \$700,000, leaving about £100,000 sterling thereof which never reached them :

That the advances continued to be made for over two years, till a very large balance remains due to the plaintiffs :

That it was a question of fact to be decided by a jury, and not a legal matter for the court, as to whom and on whose credit the bank really advanced its money—whether to the Detroit and Milwaukee Company, to Messrs. Brydges and Reynolds individually, or to the Great Western Railway Company :

That there was evidence to go to the jury on this point, although the common seal of the Great Western Railway Company was not used to sanction the acts of its officers or directors, or to shew the assent of the corporation to the liability :

That for the reasons previously given there is no objections to the bankers recovering the balance due on the ground that such an expenditure was beyond the statutable powers of their customers as a chartered company :

That there is no ground for nonsuit or for new trial for misdirection or admission of improper evidence : that the questions submitted to the jury by the learned judge were substantially calculated to aid the jury in determining the issue joined, and are not open to serious objection.

And as to the merits, I see no safe ground on which the court can determine that the jury found for the plaintiffs either without sufficient evidence or against the weight of evidence.

As I understand, the question of amount was agreed to be settled by a referee, who could state a case, if required, to the court, I do not feel it necessary to do more than express my view of the principles by which I consider the case to be governed.

It is satisfactory to feel that in a case of this magnitude

the opinion of a Court of Error can be taken on the serious questions involved.

McLEAN, C. J., concurred, and said that he had been desired by Mr. Justice *Burns* to state that he also fully agreed in the judgment just delivered.

Rule discharged.

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WOODRUFF AND McMICKEN V. THE CORPORATION OF THE  
TOWN OF PETERBOROUGH.

*Railway Company—Action by creditor against shareholder under C. S. C.,  
ch. 66, sec. 8—Payment of stock.*

In an action under the statute by judgment creditors of a railway company against a municipal corporation as shareholders, it appeared that the contractors for a portion of the road had received a lease from the railway company of that part for 999 years at a nominal rent; and as an inducement to the defendants and two other municipalities to take stock, they had mortgaged their lease to trustees to secure payment to such municipalities of six per cent. on the sums subscribed by them. This mortgage, to which the railway company were parties, provided for the payment by the municipalities of the amount of stock taken by each to the contractors as the work progressed, upon the estimates of the company's engineer, and the full amount of defendants' subscription had been thus paid.

*Held*, that this was a payment of defendants' stock as against the plaintiffs, who therefore could not recover.

THE plaintiffs sued as judgment creditors of the Port Hope, Lindsay, and Beaverton Railway Company, claiming from defendants the amount of their subscribed stock in the company, alleging that the same remained unpaid.

*Pleas*.—1. That defendants were not stockholders.

2. On equitable grounds, that the subscription was under a by-law authorising subscriptions solely to aid in constructing that portion of the railroad between Millbrook and Peterborough: that the money to be raised to pay up said stock was to be applied solely for that purpose, of which the company had notice, and accepted the subscription for such purpose, and allotted 3000 shares to defendants; and that the plaintiffs' judgment was not recovered for or in respect of any aiding or securing the construction of that portion of the railway, but for a debt incurred by the company for

purposes other than the construction of that part of the line.

3. On equitable grounds, setting up the same facts, and adding that the company, after the subscription and allotment of shares, contracted with Messrs. Tate and Fowler to construct the portion of the line from Millbrook to Peterborough for £50,000, of which the £30,000 payable by defendants for their stock should be part; and the defendants then at the Company's request paid Tate and Fowler the £30,000, which payment the railway company accepted in full satisfaction and discharge of the £30,000 payable on defendants' stock.

4. On equitable grounds, same as the second plea, except as being pleaded to £25,000 parcel, and averring a subscription of 2500 shares instead of 3000.

5. On equitable grounds, the same as the third plea, except being pleaded, like the fourth plea, to £25,000 parcel, &c., and 2500 shares.

6. That before action defendants paid up the amount of their stock in the railway company.

7. On equitable grounds, set-off as against the railway company for moneys paid at their request to their contractors and servants, and for interest, &c.

Issue was taken on all these pleas, and the 2nd, 3rd, 4th, 5th, and 7th were demurred to.

The case was tried at Toronto, in January, 1862, before *Burns, J.*

After the plaintiffs' evidence had been given a number of objections were taken, and leave reserved to move to enter a nonsuit.

The defendants' evidence was then given, and by consent a verdict was taken for the plaintiffs for £26,294, 15s. 4d., the parties arranging a special case upon the pleadings and evidence, which was accordingly set down and argued in Trinity Term last.

The material facts may be thus briefly stated:—

In 1854 the company contracted with Samuel Zimmerman to construct the road from Port Hope to Lindsay; and as a portion of the cost was to be in debentures of the

company, in December, 1855, a mortgage was given to the plaintiffs in trust to secure the due payment of debentures to the sum of £125,000 sterling and interest; and on this mortgage the judgment now in question was recovered by the plaintiffs against the railway company.

In 1856 negotiations took place between the railway company and the town of Peterborough, with a view to the construction of a branch line from Millbrook to Peterborough.

In August, 1857, the plaintiffs executed a deed poll, reciting the mortgage to them, declaring that their mortgage was never intended to and should not form any charge upon any portion of the railway to be made from the line to the town of Peterborough.

The town then proposed to pass a by-law authorising the mayor to take 3000 shares in the railway for the sole purpose of securing the construction of that portion of the line from Millbrook to Peterborough, and he was authorised to borrow to the extent of £30,000 on debentures, and that the money should be applied to secure the construction of that portion of the road.

After the publication and before the approval of this by-law by the ratepayers, certain contractors named Tate and Fowler offered to contract with the railway company to construct the Millbrook branch, and as part of the consideration stipulated that they should receive a lease of that part of the line for 999 years at a nominal rent; and as an inducement to the town of Peterborough to subscribe for the £30,000 of stock, offered to mortgage their lease when obtained as security for the payment of the interest on that amount.

After the by-law had been read a second time the railway board passed a resolution, which was sent to Peterborough, to the effect that the company had agreed to give such a lease to Tate and Fowler; and the company having no immediate interest in the money to be raised for the stock to be subscribed by Peterborough, did thereby leave the town of Peterborough and Tate and Fowler as lessees to make such arrangements respecting the payment of calls upon said

stock as to them should seem best, the company agreeing not to interfere therewith. The resolution also stated that it was agreed the calls should only be made on that stock by instalments as the work progressed.

On the 3rd of September, 1857, the ratepayers approved of the by-law, which was passed on the 15th of September.

On the 7th of November, 1857, another by-law was passed to raise the money under the Consolidated Municipal Loan Fund to the extent of £25,000.

On the 13th of November, 1857, the proposed lease was made by the railway company to Tate and Fowler, and on the same day a mortgage was executed between Tate and Fowler, William Cluxton of Peterborough, David Smart of Port Hope, and the railway company. It recited the lease, and Tate and Fowler's contract with the company to build the branch for £50,000, of which £30,000 was to be provided by the town of Peterborough, £10,000 by the town of Port Hope, and £10,000 by the contractors themselves, for which they were to receive stock.

It then mortgaged the lease to Cluxton and Smart in trust; and provided that if the municipalities of Peterborough and Port Hope should advance these sums and pay over the same to Tate and Fowler, as the work progressed, upon the monthly estimates of the railway company's engineer, then the contractors would secure the right of way and perform the work in the manner therein set forth; ten per cent. to be kept back until completion of the work, the road to be open for traffic in twelve months, &c.; and would pay to the respective treasurers of the municipalities six per cent. on the moneys to be advanced by them. It also provided for the maximum rate of freight during the first ten years of the lease.

On the 14th of November, 1857, the mayor subscribed for the stock under the corporate seal. Thereupon Fowler and Tate proceeded to construct the road under the superintendence of the company's engineer, who acted at the same time for the town of Peterborough.

The case stated that the £30,000 subscribed for by Peterborough was from time to time, with the knowledge

and assent of the railway board, paid to the contractors as the work progressed.

A subsequent by-law was passed by the defendants to make good a balance of the £30,000, not previously raised.

On these substantial facts the question for the opinion of the court was, whether the plaintiffs were entitled to recover.

*Cameron*, Q. C., and *Galt*, Q. C., for the plaintiffs, cited *The National Patent Steam Fuel Company*, Ex parte *Worth*, 33 L. T. Rep. 87; *Nickoll's Case*, Re *The Cosmopolitan Life Assurance Company*, 24 Beav. 639; Ex parte *Daniell*, Re *The Universal Provident Life Association*, 1 De G. & J. 372; *Wollaston's Case*, Re *Home Counties and General Life Assurance Co.*, 4 De G. & J. 437; *Lund's Case*, Re *Mexican and South American Co.*, 33 L. T. Rep. 85; *Hyam's Case*, Re *Mexican and South American Co.*, 1 De G. F. & J. 75; *Smith v. Spencer*, 12 C. P. 277.

*Robert A. Harrison*, for the defendants, cited 14 & 15 Vict., ch. 51, sec. 18; *Ness v. Angas*, 3 Ex. 805; *Newry and Enniskillen Railway Company v. Combe*, Ib. 565; *Ness v. Armstrong*, 4 Ex. 21; *Birkenhead, Lancashire, &c., R. W. Co. v. Pilcher*, 5 Ex. 24; *Thomas v. Cross*, 7 Ex. 728; *Beaumont v. Greathead*, 2 C. B. 494; *Thorne v. Smith*, 10 C. B. 659; *Brewster v. The Canada Company*, 4 Grant Chy. Rep. U. C. 443; *The Municipality of Guelph v. The Canada Company*, Ib. 632; *Laird v. Birkenhead Railway Company*, 1 L. T. Rep. N. S. 159; *West Cornwall R. W. Co. v. Mowatt*, 15 Q. B. 521; *Higgins v. The Corporation of Whitby*, 20 U. C. R. 296; 2 Sm. Lea. Cas. 168, 169; *Collins v. Blantern*, 2 Wils. 341; *Moore v. McKinnon*, 21 U. C. R. 140; Bac. Abr. "Corporations" E.

MCLEAN, C. J.—On the sixth plea it was proved by the president of the railway company that an arrangement was made with the defendants, on the 26th of August, 1857, that the calls on the amount of stock to be subscribed by them should be paid at such times as would suit the contractors, according as the works advanced; and by the

evidence of Mr. Stephenson it appears that the plaintiffs were left by the railway company to pay the calls upon such stock as required by the contractors, and that the whole amount of £30,000 had been paid to the contractors with the sanction of the railway company.

It is only upon the ground that the stock subscribed for was due to the railway company at the time this action was brought that the plaintiffs can have any right to recover. Then could the railway, after the payment of the £30,000 to the contractors by their sanction, maintain an action against the defendants for the amount of stock subscribed for, as still due and owing to the company, or could the plaintiffs as creditors of the railway company attach the moneys in the hands of the defendants as still due and owing to the company?

Any attempt of the railway company to collect the amount would be met by proof of payment to the railway contractors by their sanction and authority, and the action would unquestionably be defeated. Similar proof of payment must establish that money paid upon the order or authority of the railway company cannot be any longer due and owing to them.

I think, therefore, that the plaintiffs are not entitled to recover in this action, and that a verdict should be entered for the defendants.

HAGARTY, J.—As I understand the plaintiffs' argument, it is contended that in fact the defendants, as stockholders, have never paid up their stock in the sense required by law : that the money they paid to Tate and Fowler cannot be considered as their *bonâ fide* contribution to the common capital of the company, but an advance to these contractors on security given by them ; and that such an arrangement amounts to a fraud on the other stockholders, and especially on the creditors of the company.

If we accede to this view of the plaintiffs, our decision in effect amounts to this—that the corporation of Peterborough having actually expended £30,000, the whole amount of their subscribed stock, in making this part of the road, are

still liable to pay all this money over again to the general creditors of the company.

I think such a result, so opposed to the obvious justice of the case, should only be arrived at on very clear grounds and on indisputable authority.

It may be readily conceded that the directors of a joint-stock company have no right, at all events as against their creditors, to declare any number of shares subscribed for by a stockholder to be paid-up shares, when in fact the holder had not paid therefor. Creditors may be well held to be entitled to the benefit of a capital stock actually paid up by the shareholders, and no illusory or fictitious arrangement, declaring that to be paid up which is not paid, may be permitted; and some of the cases cited in argument illustrate this position.

But I have seen no case in which, when the stock had been in fact paid and expended in the construction of the work, the creating of which was the express purpose of the joint adventure, it was contended that any preference or advantage given to the stockholder whose money was thus applied could ever undo, as it were, what had been done, and place him in the position of paying twice.

I think a palpable distinction exists between depriving him of any advantages which he may have improperly obtained over the other stockholders, and fixing upon him a double liability.

For example, a man may be induced to take 100 shares in a railway company on the express agreement and contract of the directors that his shares shall be preference shares, and on the faith thereof he subscribes and pays up in full. The company may have no power to create preference stock, and there may be a clear equity in any shareholder to rescind such an arrangement and place him on a level with his co-shareholders; so if the directors had induced him to subscribe and pay up his stock on giving him the bond of the company, or some security owned by them, to guarantee him from loss or for a fixed rate of dividend, all this may very probably be successfully assailed in equity.

But can a judgment creditor of this company in this

country bring an action like the present, or a like creditor in England proceed against him by *sci. fa.*, and successfully call upon him again to pay up the whole of his stock on the ground of this illegal preference given to him?

I think the cases are clearly distinguishable, and that the judgment creditor is answered by proof that the stockholder did in fact pay up the whole money amount of his shares into the capital of the company for the legitimate purposes thereof.

Had the transaction been colourable; had it, instead of an actual payment, made and received as such, been in reality a loan to the contractors or to the railway company on security, the case might be totally different, and it might then be insisted on as no defence against the judgment creditor. I see nothing in the facts before me to lead me to this conclusion.

I am not called upon to decide whether the present defendants can legally retain the mortgage of the lease, or any security held by them by which they may gain any advantage over stockholders.

I do not see how this court can settle the equities or direct what must be done with any securities. It is enough for me to see my way to the conclusion that these judgment creditors ought not to succeed in this court on the issue joined as to payment of the stock.

Ness v. Angas (3 Ex. 810) and Ness v. Armstrong (4 Ex. 21) go to prove that a remedy like the present, given by express enactment and opposed to the common law, must be strictly pursued, and no defendant can be made liable except he be brought within the express words of the statute, whatever equity may be created as between him and the company or the stockholders; and Mines Royal Societies v. Magnay (10 Ex. 494) illustrates the difficulty a court of law must have in attempting to administer such equities as are here set up.

I think the *postea* should go to the defendants.

*Per cur.*—Judgment for defendants.

During this term the following gentlemen were called to the bar: MICHAEL HAYES, JOHN KEITH GALBRAITH, and THOMAS DEACON.

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MEMORANDA.

In the vacation after Michaelmas Term, the Honourable Sir John Beverley Robinson, Baronet, C.B., Presiding Judge of the Court of Error and Appeal, and late Chief Justice of Upper Canada, died.

In the same vacation, the Honourable Robert Easton Burns, one of the judges of the Court of Queen's Bench, died.

In the same vacation, Skeffington Connor, Esquire, one of Her Majesty's Counsel, was appointed a judge of the Court of Queen's Bench in the room of the late Mr. Justice Burns.

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## HILARY TERM, 26 VICTORIA, 1863.

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*Present :*

The Hon. ARCHIBALD McLEAN, C. J.

„ JOHN HAWKINS HAGARTY, J.

„ SKEFFINGTON CONNOR, J.

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THE QUEEN V. DAVID DINGMAN AND JULIA ANN CORWIN.

*Consol. Stats. C., ch. 99, sec. 66—Indictment for manslaughter—Right to convict of assault under.*

Under Consol. Stats. C., ch. 99, sec. 66, there can be no conviction for an assault unless the indictment charges an assault in terms, or a felony necessarily including it, which manslaughter is not.

Where, therefore, the indictment was for manslaughter, in the form allowed by that act, charging that defendants “did feloniously kill and slay” one D.,

*Held*, that a conviction for assault could not be sustained.

THE prisoner was indicted for manslaughter, as follows :  
The jurors for our lady the Queen upon their oath present that David Dingman and Julia Ann Corwin on the 23rd of August, 1862, at the township of West Zorra, in the county Oxford, aforesaid, did feloniously kill and slay one Eliza Dingman.

Upon the trial at Woodstock, before *Richards, J.*, it was proved in evidence that about a week before the decease of Eliza Dingman, Julia Ann Corwin struck her a blow in the face, and the counsel for the Crown endeavoured to establish that death was caused or hastened by that blow and other ill-treatment on the part of the parties charged with manslaughter in the indictment. The medical testimony, however, established that Eliza Dingman had been for a long time in a bad state of health : that her husband had been told that in consequence of her diseased state of body she could not live long ; and the medical attendant also swore that it would be unsafe to pronounce an opinion that her death was caused or hastened by any acts of violence given in evidence on the part of Corwin. An acquittal was

directed upon this testimony, but the jury were told that they might acquit of the felony, and find Julia Ann Corwin guilty of an assault, which they accordingly did.

The verdict being objected to, on the ground that upon this indictment no such conviction could take place, the learned judge admitted the accused to bail, and reserved the case for the consideration of this court.

*W. H. Burns*, for the Crown, cited Consol. Stats. C., ch. 99, sec. 66; *Regina v. Bird*, 2 Eng. L. & E. Rep. 428, S. C. 5 Cox C. C. 1; *Regina v. Phelps*, 1 Car. & Marsh 180; *Regina v. Lewis*, 1 C. & K. 419; *Regina v. Gibson*, 2 C. & K. 781; *Regina v. Folkes*, 2 Moo. & Rob. 460; *Regina v. Connell*, 6 Cox C. C. 178; *Regina v. Oliver*, 8 Cox C. C. 384; *Regina v. Reid*, 2 Den. C. C. 88.

*Anderson*, for the prisoner, cited *Regina v. Bird*, 2 Den. C. C. 94.

MCLEAN, C. J.—By the 66th section, Consol. Stats. C., ch. 99, it is provided that “on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever where the *crime charged* includes an assault against the person, the jury may acquit of the felony and find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding.”

Under this section such a conviction can only take place where the *crime charged includes an assault*. The *crime charged* in this case is manslaughter, but whether by poisoning or by what means is not shewn, and no assault is in any way charged. The crime charged does not in fact include an assault. No offence is charged as having been committed with force and arms.

In the case of *The Queen v. Birch et al.* (1 Den. C. C. 185) the court held that in order to convict of an assault under this section the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment.

In the case of *The Queen v. Bird and Wife* (2 Den. C. C.

94)—a case in which the accused to an indictment for an assault pleaded a former acquittal on an indictment for murder in which a charge of assault was included, and on which a conviction for an assault might have taken place—the court sustained the conviction under the indictment for the assault alone, holding that though a conviction might have taken place under the indictment for murder charging an assault, yet that the verdict of not guilty on that indictment in fact was not an acquittal of the assault, with respect to which nothing had been said upon the former trial. This seems to be the effect of that judgment; and though on the main question the most eminent judges were divided in opinion, they all concurred in holding that no conviction could take place unless the felony charged included an assault, and that an assault must be expressly charged upon the face of the indictment.

There being no assault charged, I think no conviction under the clause of the statute to which I have referred can be sustained, and that the accused is entitled to be discharged.

HAGARTY, J.—The indictment is for manslaughter, in the short form allowed by our statute, 18 Vict., ch. 92, (Consol. Stats. C., ch. 99, sec. 51,) that the prisoner did “feloniously kill and slay” deceased. The evidence shewed that the prisoner had struck deceased in the face two weeks before her death, and other acts of violence were attempted to be proved, but the medical testimony rendered it quite unsafe to conclude that such acts conduced to or hastened her death. Acquittal for the felony was directed, and the jury were told they might convict for an assault.

The case of *The Queen v. Bird and Wife* (2 Eng. L. & E. Rep. 428, 2 Den. C. C. 94) exhausts the law on this subject. It was twice argued, and the opinion of fourteen judges given; eight on one side and six on the other.

The case was argued in 1850 and 1851, when the law allowed in England, as it still does here, that in case of felony where the crime charged includes an assault against the person the jury may acquit of the felony and convict of

assault. At that time also, both in England and in Canada, an indictment for murder or manslaughter had to charge the manner in which the crime was committed, as by stabbing, beating, poisoning, &c.

In August, 1851, in consequence of the difficulties suggested by Bird's case, the above-quoted power was taken from the jury, and the section repealed, and at the same time indictments for murder and manslaughter were allowed in their present concise shape.

In Canada, by statute 18 Vict., ch. 92, we adopted the same concise form of indictment, but we retained the clause allowing the conviction for assault already quoted.

In the view I take it is essential to bear all this in mind. In Bird's case the indictment for murder in the old form shewed murder by personal violence, charging an assault in every count. The verdict was not guilty generally. A careful perusal of the very learned judgments delivered leads me to the conclusion that in the opinion of the judges it could only be possible to convict of assault under the statute where an assault was expressly charged in terms on the record. The minority, who thought there could have been a conviction for an assault, especially notice this.

*Alderson, B.*, says: "It is clear, first, that the words 'crime charged' mean crime charged as a felony, for the enactment only takes effect upon an acquittal. Secondly, it is clear that the crime charged as a felony must be one which necessarily includes an assault. In other words, the assault to fall within the act must be an integral part of the felony charged. It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must of necessity include an assault. The crimes of rape, and of cutting and wounding with intent, &c., are instances of this latter proposition; although there it is not unusual, and perhaps better, expressly to charge an assault in the indictment; but in *murder and manslaughter it is necessary to do so*, for murder and manslaughter do not necessarily include an assault. The cases of death by poisoning or by criminal omission are instances of this. We must, therefore, in all

cases look to the charge in the indictment to determine the point."

*Parke*, B., says: "There must be a charge of an assault as parcel of a felony." *Jervis*, C. J., says: "It is absolutely necessary that the crime charged should legally include an assault. Crimes of this nature are murder *by violence*, rape, robbery, stabbing, and the like. You cannot bring the case within this act by averring in the indictment an assault as accompanying a crime which legally does not include an assault; nor, on the other hand, is it necessary in order to found the jurisdiction of the jury to state an assault in an indictment for a crime which legally includes an assault. It is prudent to do so, but it is not in strictness necessary; for where the crime charged includes an assault by implication the charge of assault appears upon the indictment, and thus the rule is satisfied, which requires that when the record is made up the charge should appear upon which the prisoner is found guilty and subsequently punished."

Lord *Campbell* says: "I think the judge ought to have directed the jury that if they believed the medical witnesses and acquitted the prisoners of the murder, they must direct their attention to the uncontradicted evidence proving the assault, and find a verdict of guilty upon the portions of the indictment charging these assaults, should they think that the evidence warranted such finding."

*Martin*, B. "The true criterion is, is the assault in point of fact charged upon the face of the indictment, and is it part of the act or transaction which the prosecutor gives evidence of as conducing to the felony?"

*Maule*, J. "The crime charged is, I think, to be determined by looking at the indictment; the indictment is the legal charge, and there the crime is charged in several counts comprehending assaults," &c.

All these judges were in favour of allowing a conviction for assault on such an indictment.

*Patteson*, J., says: "I am satisfied that the clause extends to such crimes which in their nature may or may not include an assault, but which are charged in the indictment as so doing."

*Cresswell*, J., says: "The crime charged means the *felony* charged, and that must be of such a nature that it cannot be committed without an assault."

*Coleridge*, J. "We can learn no more from looking at the face of the indictment than whether any assault is charged or not."

I gather from this case that all the learned judges thought that the record should in terms charge an assault; as *Parke*, B., urged, "There must be a charge of an assault as parcel of a felony."

But the same English act which repealed the clause in question provided the concise form of indictment now in use. Its 28th section provides, moreover, that in the plea of *autrefois acquit* or *convict* it shall be sufficient to say that the party has been lawfully acquitted or convicted of the offence charged in the indictment.

We have now to decide on the application of the clause repealed in England, but retained in Canada, on the indictment before us.

No assault is in terms charged in this indictment. The allegation is merely that the prisoner did feloniously kill and slay, &c., and as *Alderson*, B., says: "Murder and manslaughter do not necessarily include an assault. The cases of death by poisoning or criminal omission are instances of this."

If acquitted generally on this indictment and arraigned again on an indictment charging the assault given in evidence here, it is not easy to see how the prisoner could prove a plea of *autrefois acquit*. The former record would not shew that any assault whatever was necessarily or by implication charged, and I am strongly of opinion that the judges who decided *Regina v. Bird* would have held his plea bad, and that they would also on the indictment before us here decide that the prisoner could not be legally convicted of an assault where no such misdemeanour was charged on the record.

Lord *Campbell's* language on this point is clear. This judge could not direct the jury's attention to the assault, telling them "*to find a verdict of guilty upon the portions*

*of the indictment charging the assault,"* as no such charge appeared on the record.

On the broad ground that no conviction can be had for an assault on an indictment not charging an assault in terms or a felony necessarily implying an assault, I think the verdict in this case cannot be supported.

Had the indictment before us charged a manslaughter by bodily violence, I think the verdict could be upheld, on the rule laid down in *The Queen v. Birch*, (1 Den. C. C. 186,) that "in order to convict of an assault under this section the assault must be included in the charge on the face of the indictment, and also be a part of the very act or transaction which the Crown prosecutes as a felony by the indictment. . . . The enactment is not to be confined to cases where the prisoner committed the assault in the prosecution of an attempt to commit a felony, nor is it to be extended to all cases in which the indictment for a felony on the face of it charged an assault."

No felony of any kind was here proved. The assault given in evidence was a part of the very act or transaction which the Crown prosecuted as a felony; and the case seems to me in its legal bearing very similar to *Birch's* case, where the proof of the robbing by any one wholly failed, but the assault was proved, being in the evidence relied on as a part of the felony charged.

The case of *The Queen v. Watkins*, (2 Moo. C. C. 217,) 1841, shews the particularity required. The indictment was for burglary with intent to ravish, and that in the dwelling the prisoner feloniously did wound, &c.

The jury found the prisoner not guilty of the felony and burglary, but guilty of assault.

The case being reserved the judges held the conviction wrong, as "the assault in this case is not included in the crime charged, of burglary with intent to commit rape. The assault of beating and wounding is only additional."

Conviction quashed.

## GLASS V. WHITNEY.

*Warehouse receipts—Endorsement of—Consol. Stats. U. C., ch. 54, secs. 8 and 9, Construction of.*

The plaintiff declared that one G. had deposited with the defendant certain wheat, and obtained from him a warehouse receipt therefor : that by the course of trade such receipt was transferable by endorsement, and the property in the wheat would pass to an endorsee : that G. sold said wheat to the plaintiff and endorsed to him the receipt ; but that when he presented it to the defendant the latter refused to deliver to him the wheat. Defendant pleaded that before he had any notice or knowledge of such transfer or sale, the wheat was taken out of his warehouse by G.

*Held*, a good defence, for at common law the endorsement and transfer of the receipt would clearly not pass the property ; and the Consol. Stat. C., ch. 54, relied upon by the plaintiff, has no application to an absolute sale of goods, but to pledges only, to secure payment of a bill or note negotiated, or a debt contracted when the receipt is endorsed over.

THIS was an action brought to recover from the defendant the value of a quantity of wheat.

Plaintiff declared as follows :—“ That the defendant, carrying on business under the name and style of F. A. Whitney & Co., as a warehouseman, did, on the 14th of October, 1862, as such warehouseman, receive in store for A. L. Groundwater 777 $\frac{32}{60}$  bushels of fall wheat, and did thereupon give unto the said A. L. Groundwater a receipt for the same, known as a warehouse receipt, to the effect following :—

No. 133.

Toronto, Oct. 14th, 1862.

Received in store, for A. L. Groundwater, the following property, in apparent good order and condition, subject to storage, seven hundred and seventy-seven  $\frac{32}{60}$  bushels fall wheat.

F. A. WHITNEY & Co.

777 $\frac{32}{60}$  bushels.

And whereas by the course of trade in this province such warehouse receipt was and is transferable by endorsement, and the property in the wheat mentioned therein by such course of trade would pass to an endorsee and holder of such receipt, the plaintiff says that the said A. L. Groundwater afterwards, and before the commencement of this suit, sold to the plaintiff the said 777 $\frac{32}{60}$  bushels of wheat mentioned in said receipt, and duly endorsed and delivered the said receipt to the plaintiff, whereby the said wheat became, was, and is the property of the plaintiff ; and there-

upon the defendant became liable by such course of trade to deliver the said wheat to the plaintiff upon presentation by him of said receipt; yet the plaintiff says that the defendant did not deliver the said wheat mentioned in the said receipt to the plaintiff, although the plaintiff duly presented the said receipt to the defendant, and requested him to deliver the said wheat, but the defendant wholly neglected and refused, and still does neglect and refuse so to do."

The second and third counts were upon similar receipts for other wheat.

The fifth plea, to all the counts, was, that after the making of the said several receipts, and the receipt by the defendant of the several quantities of wheat therein respectively mentioned, and before the defendant had any knowledge or notice of the transfer of the said receipts respectively to the plaintiff by the said A. L. Groundwater, or of the sale of the said wheat to the plaintiff, as in those counts alleged, the said A. L. Groundwater took, had, and received to his, the said A. L. Groundwater's own use, out of the warehouse of the defendant, the several quantities of wheat in the said several receipts respectively mentioned.

To this plea the plaintiff demurred, on the grounds, that after the making of the several receipts by the defendant, and the transfer of said receipts by the said A. L. Groundwater to the plaintiff, it is no answer to the plaintiff's claim that the said A. L. Groundwater took and received from the defendant the said wheat as in said plea mentioned, as the defendant does not aver that the said A. L. Groundwater was at that time the holder of the said receipts.

*Galt*, Q. C., for the demurrer, relied on Consol. Stats. C., ch. 54, sec. 8; ch. 59, sec. 7; ch. 92, secs. 68, 69; and cited *Holton v. Sanson et al.*, 11 C. P. 606.

*M. C. Cameron*, contra, cited *Deady v. Goodenough*, 5 C. P. 173; *Proudfoot v. Anderson*, 7 U. C. R. 573; *McEwan v. Smith*, 13 Jur. 265; *Goodenough v. The City Bank*, 10 C. P. 51; *The Wisconsin, &c., Bank v. The Bank of British North America*, 21 U. C. R. 284; *Bentall v. Burn*, 5 D. & R. 284.

McLEAN, C. J.—It was contended for the plaintiff that by the course of trade the certificates endorsed by Groundwater passed their respective contents, and that the plaintiff thereby became the owner of the wheat: that being the owner he was entitled to receive the same from the defendant on production of the endorsed receipts, but that the defendant alleged that he had delivered the same again to Groundwater, and that without the receipts being produced the defendant had no right to redeliver the wheat to Groundwater.

Had there been an advance of money by the plaintiff to Groundwater, and the receipts endorsed to him as collateral security for the amount of advances, the argument of the plaintiff's counsel might well be sustained; for under ch. 54 of the Consolidated Statutes of Canada, section 8, it is provided that "notwithstanding anything to the contrary in the charter or act of incorporation of any bank in this province, any bill of lading, any specification of timber, or any receipt given by a warehouseman, miller, wharfinger, master of a vessel, or carrier, for cereal grains, goods, wares or merchandise, stored or deposited, or to be stored or deposited in any warehouse, mill-cove, or other place in this province, or shipped in any vessel, or delivered to any carrier for carriage, from any place whatever to any part of this province, or through the same, or on the waters bordering thereon, or from the same to any other place whatever, and whether such cereal grains are to be delivered upon such receipt in species or converted into flour, may, by endorsement thereon by the owner of or person entitled to receive such cereal grains, goods, wares or merchandise, or his attorney or agent, be transferred to any incorporated or chartered bank in this province, or to any person for such bank, or to any private person or persons, as collateral security for the due payment of any bill of exchange or note discounted by such bank in the regular course of its banking business, or any debt due to such private person or persons, and being so endorsed shall vest in such bank or private person from the date of such endorsement all the right and title of the endorser to or in such cereal grains, goods, wares or mer-

chandise, subject to the right of the endorser to have the same retransferred to him, if such bill, note, or debt be paid when due; and in the event of the non-payment of such bill or note when due, such bank or private person may sell the said cereal grains, goods, wares, or merchandise, and retain the proceeds, or so much thereof as will be equal to the amount due to the bank or private person upon such bill, or note, or debt, with any interest or costs, returning the overplus, if any, to such endorser."

The ninth section provides that "no such cereal grains, goods, wares or merchandise, shall be held in pledge by such bank or private person for any period exceeding six months; and no transfer of any such bill of lading, specification of timber or receipt, shall be made under this act to secure the payment of any bill, note, or debt, unless such bill, note, or debt, be negotiated or contracted at the same time with the endorsement of such bill of lading, specification of timber, or receipt; and further, no sale of cereal grains, goods, wares or merchandise, shall take place under this act, until or unless ten days' notice of the time and place of such sale has been given by registered letter transmitted through the post-office to the owner of such cereal grains, goods, wares or merchandise, prior to the sale thereof."

It is, I think, evident that this act was first introduced for the purpose of enabling banks to take collateral security for advances made to enable parties to purchase grain or timber. Its title is "An Act respecting Incorporated Banks;" but by the eleventh section its provisions are extended to all banks chartered during the session of the year 1859, and they are also extended by the eighth section to private persons in respect to any debts due to such private persons. Individuals could before the passing of that act have taken collateral security upon any property in the hands of a debtor, but they could not do so merely by the endorsement of a bill of lading or specification of timber, or any receipt given by a warehouseman, or miller, or other person, as pointed out by the eighth section of the act.

It is not alleged that the certificates or receipts for wheat given by the defendant to Groundwater were endorsed for

the purpose of giving collateral security to the plaintiff for a debt due to him. On the contrary, the plaintiff's absolute right to such wheat is rested on the endorsement of these receipts. They could not possibly have any effect as a transfer at common law. The defendant, as bailee, would be bound by them to Groundwater, as affording evidence of the receipt into store of the quantities of wheat specified; and, notwithstanding what is alleged to be the course of trade, Groundwater alone could enforce the redelivery of the wheat, unless indeed he made a transfer more formal and more substantial than the mere endorsement of the several receipts.

In the cases cited in the argument it is evident that the plaintiff had taken an assignment from the parties holding the receipts, besides taking the endorsed receipts of the wharfingers or warehousemen.

In the case of *Holton v. Sanson et al.*, (11 C. P. 606,) and *Deady v. Goodenough*, (5 C. P. 173,) it is evident that the right to recover did not rest upon the mere endorsement of the warehouse receipts. In the latter case a delivery order was given with the wharfinger's receipt to the purchasers of the flour by the defendant Goodenough, who acted as broker in the sale of the flour; and it was for negligence in giving up these documents, by which the vendees were enabled to get possession of the flour without payment of the amount agreed upon, that the action was brought. With respect to these, *Macaulay*, late Chief Justice of the Common Pleas, observes in his judgment in that case, at page 176, "The delivery of such instruments was not a constructive delivery of possession of the flour itself, either to the defendant himself when he received them, or by him when he parted with them. They do not pass the property in goods like bills of lading, at all events until presented and acted upon."

In the former case, *Richards, J.*, in delivering the judgment of the court, says: "As to the first count," (trover for a quantity of wheat,) "assuming that the wheat belonged to Clarkson, Hunter & Co., and was all in the defendants' possession separated from any other wheat, the quantity

being exactly that bought, namely, 500 bushels, then the property in the wheat passed to the plaintiff by virtue of the bargain and sale. The endorsing of the receipt was nothing more than a direction to the defendant to deliver the property to the person who had become the owner, and who had a right to it independently of that endorsement. In *Dixon v. Yates*, 5 B. & Ad. 340, *Parke, J.*, says: 'I take it to be clear that by the law of England the sale of any specific chattel passes the property in it to the vendee without delivery.' "

In that case, *Holton v. Sanson et al.*, Galt, Q. C., for the plaintiff, in opposing a rule for a new trial, contended that as to the count for trover the property passed by virtue of the sale, and the transfer of the receipt was merely an order to the defendant to deliver to the plaintiff what he had purchased from *Clarkson & Hunter*, and what the defendant acknowledged they had in store for them. So in this case the endorsement of the receipts only amounted in fact to such order; the sale being an absolute one, the certificates and the endorsements upon them could not operate as a collateral security for a debt which did not exist.

The 59th chapter of the Consolidated Statutes of Canada, on which some reliance seemed to be placed on the argument, only relates to the dealings of factors with other parties in certain cases, and none of its provisions assist in making out a title for the plaintiff to the wheat mentioned in the defendant's receipts.

The 68th, 69th, and 70th sections of ch. 92, Consol. Stats. C., are by the tenth section of chapter 54 of these statutes made applicable to all false bills of lading, receipts or documents mentioned in the eighth section of the latter act, and prescribe the punishment of persons offending against their provisions. Whether any of them apply to the conduct of *Mr. Groundwater* in selling a quantity of wheat for which he held the receipts after the whole had been withdrawn by himself (if the plea of the defendant speaks truly) it is not necessary to inquire, but the defendant could not be guilty of anything criminal in giving back to the depositor the

wheat stored by him, and which he had a right to withdraw at any time he thought proper.

The plaintiff relied upon the honesty of the person from whom he purchased, and certainly the possession of the receipts was strong presumptive evidence that the wheat was still in the defendant's warehouse. If notice of the purchase had been given to the defendant, accompanied by an offer to pay the storage, and he had subsequently allowed the wheat to be withdrawn, there can be no doubt that as the purchaser of the wheat the plaintiff could recover its value from the defendant, but it would be very unjust to hold the defendant liable for delivering the wheat to Groundwater at a time when he was in utter ignorance that the defendant had any claim whatever upon it.

I think defendant entitled to judgment on the demurrer.

HAGARTY, J.—The argument for the plaintiff seems to concede that at common law the plea would be a good bar: that in fact a bailee receiving goods in store for the owner, and giving him a receipt acknowledging such fact, must be protected if he give up the goods to the owner on demand, in good faith, unaware of any sale or disposition of them by the bailor, and that the law would not impose upon the bailee any duty to insist, as a condition of such redelivery, on the return of his receipt.

This would seem to be the law. As *Willes, J.*, remarks in *Sheridan v. The New Quay Company*, (4 C. B. N. S. 659,) a case relating to carriers, "The law would have protected them against the real owner if they had delivered the goods in pursuance of their employment, without notice of his claim." The principle here recognised runs, I presume, through all classes of bailees. Delivery to the original bailor, the only person known as owner, or as having any title or interest, will be a good discharge; and as to the effect, independently of statute law, of warehouse receipts transferred by endorsement from vendor to vendee, as is remarked by *Macaulay, C. J.*, in *Deady v. Goodenough*, (5 C. P. 176,) "The delivery of such instruments was not a constructive delivery of possession of the flour itself, either to the defendant when

he received them, or by him when he parted with them. They do not pass the property in goods like bills of lading, at all events until presented and acted upon." The well-known case in the House of Lords, *Smith v. McEwan*, (13 Jur. 265,) is also in point.

But the plaintiff relies on the statute, Consol. Stats. C., ch. 54, the provisions of which have been stated at length by the learned Chief Justice.

Ch. 59, Consol. Stats. C., sec. 7, also relied upon, merely applies to dealings with factors and those dealing with them in certain cases, and does not seem to affect this case.

Chapter 92, Consol. Stats. C., secs. 68 & 69, provides for the punishment of warehousemen and others giving false receipts for goods not actually received, and to punish fraudulent dispositions of goods by owners on which consignees have made advances.

I am of opinion that the act chiefly relied on by the plaintiff has no application to this case: that it does not affect any direct sale or purchase of property, such as the plaintiff sets up in this case, but only applies to pledges of property to secure payment of a note, bill, or debt, discounted or contracted at the time when the receipts are endorsed to the bank or private person: that the latter only acquire a limited and not an absolute right, that of retaining the property for a period not over six months; and if the note or debt for which it is so deposited be not paid when due, then to sell, after certain notice to the owner, sufficient to pay the claim and account for the surplus. The transaction before us is one of absolute sale and purchase, unconnected with any giving of time or security.

It is pressed upon us that, as alleged in the declaration, the custom of trade here is to endorse these warehouse receipts, and to treat the property as passing thereupon to the endorsee. This may be so, and the endorsee may generally perfect his title by notice to the bailee or holder of the goods. In the case before us the receipts do not even profess to be negotiable, (if they could be made so,) but are simple acknowledgments that the defendant had received certain specified property in store for Groundwater. I know of no

principle of law, in the absence of some express statutable declaration, which could warrant us in holding the giver of this receipt answerable in this action to a plaintiff of whose claim he never heard until after he had in good faith redelivered the goods to the only person he ever knew as owner. We are asked to annex to his contract as bailee the condition that he shall not be bound to redeliver these goods unless and until the receipts given by him be first handed back to him.

I think the defendant is entitled to judgment.

CONNOR, J., concurred.

Judgment for defendant on demurrer.

### ROBERTSON V. FREEMAN.

*Clerk of the peace—County attorney—Consol. Stats. U. C., ch. 106, sec. 7.*

In 1858 the plaintiff was appointed county attorney for Wentworth. In May, 1862, following, the person who had for many years been clerk of the peace for that county died, and in July defendant was appointed to succeed him in such office.

Consol. Stats. U. C., ch. 106, sec. 7, enacts that any clerk of the peace appointed after that act "shall be *ex officio* county attorney for the county of which he is clerk of the peace."

*Held*, that defendant upon his appointment as clerk of the peace became also county attorney, although the plaintiff's commission had been no otherwise revoked, and he had received no notice of any change in his position.

### SPECIAL CASE.

THIS is an action brought by the plaintiff against the defendant to recover the sum of \$500, alleged to have been received by the defendant for the use of the plaintiff, between the first day of September, 1862, and the twelfth day of November of the same year, being the alleged amount of certain fees and emoluments received by the defendant, and alleged to be due and of right payable to the plaintiff as county Crown attorney for the county of Wentworth.

By consent of the parties, and by the order of Mr. Justice *Morrison*, dated 21st of November, 1862, and granted according to the Common Law Procedure Act, the following case has been agreed upon, and is now stated for the opinion of the court, without any pleadings:—

1st. On the 10th of June, 1857, the Provincial Legislature passed an act, entitled "An Act for the appointment of

County Attorneys, and for other purposes in relation to the local administration of justice in Upper Canada," 20 Vict., ch. 59; Consol. Stats. U. C., chaps. 37 and 106.

2nd. When the above act became law one Peter Bowman Spohn was, and continued to be until his decease hereinafter mentioned, clerk of the peace for the said county.

3rd. On the 6th of April, 1858, by commission under the sign-manual of the Governor-General of this province, the plaintiff was appointed county attorney for the said county, "to have, hold, receive and enjoy the said office of county attorney as aforesaid, together with all and every the privileges, rights, powers, and profits, emoluments and advantages, to the said office belonging, or which ought to belong to the same, unto him, the said Thomas Robertson, for and during pleasure and his residence within the province."

4th. On the 9th of April, 1858, the plaintiff appeared before the judge of the county court of Wentworth, and took the oath of office before him, prescribed by the sixth section of the statute 20 Vict., ch. 59, and continued to discharge the duties of the office of county attorney for the said county until hereinafter mentioned.

5th. On the 28th of May, 1862, the said Peter Bowman Spohn died, and the office held by him became vacant.

6th. On the 22nd of July, 1862, the Honourable the Attorney-General of Upper Canada wrote to the defendant as follows: "I am now in a position to offer you the clerkship of the peace for the county of Wentworth, vacant by the death of the late Mr. Spohn. By law the office of county attorney goes with the former office:" which offer the defendant by letter addressed to the said Attorney-General, accepted, which letter was as follows: "Not having applied for the office of clerk of the peace for Wentworth, I cannot too highly appreciate the consideration you have extended towards me in offering it to me. I cannot allow myself to stand in the way of those whom I have recommended for the appointment; but as you give me to understand if I take the office I will not thereby prevent either of them getting it, I thankfully accept your offer."

7th. On the 1st of August, 1862, by a like commission as aforesaid, the defendant was appointed to the office of clerk of the peace of said county, "in the room and stead of Peter Bowman Spohn, deceased, to have, hold, exercise and enjoy the said office of clerk of the peace as aforesaid, together with all and every the powers, rights, privileges, profits, emoluments and advantages to the said office belonging, or which ought to belong to the same, unto him, the said

Samuel Black Freeman, for and during pleasure, and his residence within this province."

8th. This commission was sent to the defendant, with the following letter, addressed to him: "Secretary's Office, Quebec, August 12th, 1862.—Sir, I have the honour to inform you that his Excellency the Governor-General has been pleased to appoint you to the office of clerk of the peace of the county of Wentworth, in the room of Peter B. Spohn, Esq., deceased. Your commission is transmitted herewith. I have to refer you to the Honourable the Minister of Finance for instructions as to the completion of any securities you may be called upon to furnish in your capacity as clerk of the peace. I have the honour to be, &c.—A. A. *Dorion*, secretary."

9th. On the 15th of August, 1862, the defendant wrote as follows: "To the Honourable the Minister of Finance,—Sir, I have the honour of intimating to you that I have been appointed to the office of clerk of the peace for the county of Wentworth, and that the Honourable the Provincial Secretary refers me to you for the completion of any securities I may be called upon to furnish '*as clerk of the peace.*' I am prepared to furnish any such securities, but so far as I am aware the clerk of the peace is not required *as such officer* to furnish any securities. I presume that under the 9th sec. of ch. 17 of Consol. Stats. of U. C., p. 117, and sec. 7 of ch. 105, Consol. Stats. U. C., p. 948, my appointment carries with it the obligation of discharging the duties pertaining to the office of county Crown attorney. By sec. 2 of ch. 20, Consol. Stats. U. C., p. 180, that officer is required to give security for the due performance of his office. You will please advise me whether I will be required to perform such duties, and the nature of the security required."

10th. On the 23rd of August, 1862, the following reply was sent to the defendant, signed by the Deputy Inspector-General: "Sir,—In reply to your letter of the 15th instant, inquiring if your recent appointment as clerk of the peace for the county of Wentworth was intended to embrace also the office of county Crown attorney, I have the honour to refer you to the 9th section of the 7th chapter of the Consol. Statutes of Upper Canada, by which, according to the view of the Honourable Attorney-General for Upper Canada, you, as clerk of the peace, are also county attorney by operation of the statute. I beg, therefore, to enclose you herewith a printed form of bond, which you are required to fill up with the penal sum of ten thousand dollars for yourself, and five thousand dollars for each of your two sureties, and to return

same when completed to this department." Which bond, after being duly executed by the defendant and two sureties, was sent as above directed, and was accepted, and is retained by the Government as security according to law for the due performance of the duties of the office of county Crown attorney for the county of Wentworth aforesaid, by the defendant.

11th. Afterwards, and before the defendant commenced to perform the duties of the last-mentioned office, he took the oath prescribed by law in reference thereto.

12th. On the 13th of September, 1862, the Honourable the Minister of Finance, at the request of the defendant as county Crown attorney, furnished the defendant with printed instructions for his guidance as county Crown attorney, and blank forms for the returns of moneys received and paid out in connection with the division, county, and surrogate courts and the salaries of county judges and recorders.

13th. The defendant, claiming under the above-mentioned authority and instructions given to him to be and to act as county Crown attorney for the said county, from the time of taking said oath, has acted as such; and he admits, for the purpose of the question now submitted, that he has received the sum of one dollar for fees for services rendered by him for business pertaining to the said office.

14th. The plaintiff has received no intimation of any kind from the Governor-General other than aforesaid, informing him that he has been relieved from office; and notwithstanding the appointment of defendant to the office of clerk of the peace for the county of Wentworth, and the other matters above alleged, he contends that he is still county attorney for said county.

The questions for the opinion of the court are, whether the plaintiff is still the county attorney for the county of Wentworth, and whether he is entitled to the fees payable for the duties of said office performed by the defendant.

If the court shall be of opinion in the affirmative, then judgment shall be entered up for one dollar.

If the court shall be of opinion in the negative, then judgment shall be entered up for the defendant.

*Robert A. Harrison*, for the plaintiff, cited *Smyth v. Latham*, 9 Bing. 692; *Commonwealth of Pennsylvania ex rel.*, *Bowman v. Slifer*, 25 Pennsylvania Reports, 23; *Shoubridge v. Clark*, 12 C. B. 335; *Hall v. The Mayor, &c.*, of Swansea, 5 Q. B. 526; *Com. Dig. "Officer" E. a.*

*The defendant*, in person, contra.

The statutes cited are referred to in the judgments.

McLEAN, C. J.—On the 10th of June, 1857, the Legislature passed “An act for the appointment of county attorneys, and for other purposes in relation to the local administration of justice in Upper Canada,” (20 Vict., ch. 59, Consol. Stat. U. C., ch. 17.) The third section of the act as passed, ch. 59, provides that “it shall be lawful for the Governor to appoint a county attorney for each and every county in Upper Canada, who shall hold office *during pleasure*, and upon the death, resignation, or removal of any county attorney to supply the vacancy.”

The second section provides that “no person shall be appointed as a county attorney, or shall act in that capacity, who shall not be a barrister-at-law of not less than three years’ standing at the Upper Canada bar, and resident in the county for which he shall be appointed; provided that any person now” (that is, on the 10th of June, 1857) “holding the office of clerk of the peace, who is a barrister-at-law, may be appointed to the office of county attorney for the county of which he shall be clerk of the peace.”

There were at that time, and there are yet, clerks of the peace who are not barristers, and there may be some who were barristers of less than three years’ standing at the bar, and the second clause provided that any of the latter might be appointed to the office of county attorney within the county for which he was clerk of the peace. It was not made incumbent on the Governor to appoint such persons to be county attorneys of their respective counties, but they were eligible for appointment.

At the time of the passing of the act a Mr. Spohn, a barrister, held the office of clerk of the peace, and he continued to hold the office up to the time of his death, on the 28th day of May, 1862. The vacancy was filled up by the appointment of the defendant on the 22nd of July, 1862, as clerk of the peace, up to which time the plaintiff continued to act as county attorney, having been duly appointed to that office by commission bearing date the 6th day of April,

1858. The plaintiff was not removed from office except by the appointment of the defendant as clerk of the peace, and under the 9th section of 20 Vict., ch. 59, claims to be *ex officio* county attorney for the county of Wentworth, of which he is clerk of the peace. That section provides that "from and after the passing of this act no person shall be appointed as clerk of the peace for any county in Upper Canada, who is not a barrister-at-law of not less than three years' standing at the Upper Canada bar; and such clerk of the peace shall be *ex officio county attorney* for the county for which he is clerk of the peace."

By the appointment of defendant as clerk of the peace he became—not by virtue of any commission appointing him to the office, *but by operation of law*, having all the qualifications required—*ex officio* county attorney of the county of Wentworth: and the Government could not, contrary to the express provision of the statute, have continued the plaintiff in that office by any other means except by revoking or rescinding the commission given to defendant as clerk of the peace.

But by the special case submitted, it appears that the Governor gave the appointment as clerk of the peace to defendant, fully intending that such appointment should bring with it the office of *ex officio* county attorney, and he has been called upon to furnish the security required by law from the person holding the latter office, but not required for the performance of duties of the clerk of the peace. The office held by the plaintiff was *during pleasure*. The Government might at any time have removed him by any act shewing that it was the pleasure of the Governor-General that he should not longer continue to fill the office. The defendant was in fact a tenant at will, and no act could more clearly shew the determination of that will than the appointment of defendant as clerk of the peace, and as such *ex officio* county attorney.

In my opinion the defendant is entitled to judgment in this case.

HAGARTY, J.—(After referring to 20 Vict., ch. 59, secs. 2,

3, and 9, already cited by the learned Chief Justice.)—In the Consol. Stats. U. C., ch. 17, sec. 9, the ninth clause of 20 Vict. ch. 59, is somewhat varied in expression: “No person shall after this act takes effect be appointed a clerk of the peace for any county who is not a barrister-at-law of not less than three years’ standing at the Upper Canada bar, *and every clerk of the peace so appointed shall be ex officio county attorney for the county of which he is clerk of the peace.*”

When the office of county attorney was first established, Mr. Spohn filled the office of clerk of the peace for Wentworth. The Government did not avail itself of the right of appointing that gentleman to the new office, even if he were legally qualified within the clause already cited, but appointed the plaintiff, Mr. Robertson. Mr. Spohn held the clerkship of the peace till his death, in May, 1862.

It was then necessary to appoint a successor, and accordingly the present defendant was appointed clerk of the peace, being legally qualified within the words of the statute.

He was, therefore, appointed after the act above cited, and I do not see how the inevitable consequence must not be, that “*so appointed, he shall be ex officio county attorney for the county of which he is clerk of the peace.*”

The Legislature has thought proper, in the event of every appointment to be made after the passing of the act, to annex this office of county attorney to that of clerk of the peace.

Mr. *Harrison*, for the plaintiff, argues strongly that Mr. Robertson must continue to hold office as county attorney under his commission till legally dismissed, or removed by writ of discharge. But the paramount authority of the Legislature seems to me to remove the case beyond all question by the clear language used. When they declare that whenever a man be thereafter appointed clerk of the peace, he shall *ex officio* be county attorney, it seems to me to do away with all necessity for anything else, and gives the new clerk of the peace a parliamentary title to be county attorney. His appointment must, I consider, be held to revoke any existing commission to any other person. He requires no commission or appointment as county attorney. He enters

upon that office not by any commission or appointment, but solely by virtue of his appointment to the former office.

Parliament has placed in the hands of the executive the power to remove or dismiss any county attorney, and that power, I presume, may be exercised at any time, at pleasure. Judging from the language used in the several acts, I assume that the general intention was that the same person should fill both offices: that when this act was passed, certain persons may have held the clerkship of the peace who had not the legal standing deemed proper for future occupants of that office: that such persons need not necessarily be disturbed in their offices, and that county clerks could, in such cases, be appointed without reference to the other office, but that for the future a certain fixed legal standing should be required in all clerks of the peace, and that every one properly qualified, and duly appointed to the latter office, should *as such* at once become county attorney. This would, in my opinion, at once revoke or annul, by the express words of the enactment, any previous or existing appointment as county attorney.

The case cited of *Smyth v. Latham* (9 Bing. 710) shews that the subsequent appointment of a new officer, in the place and stead of one holding an office during pleasure, "bears so close an analogy to the case of a tenancy at will, where a demise to a new tenant would be a determination of the will as to the former tenant, as to make it difficult to maintain that the new appointment is not a virtual revocation of the former." Again, it is said there, "As the office is an office during pleasure only, the will of the commissioners to determine the former appointment has been sufficiently declared by the appointment of a successor."

I think we must give effect to the clear words of the statute, and hold the defendant to be the county attorney, and therefore that the *postea* should be to defendant.

CONNOR, J., concurred.

Judgment for defendant.

## OSWALD V. RYKERT ET AL.

*Execution against lands—Irregularity.*

A return of a *fi. fa.* goods in the county where the venue is laid is sufficient to warrant a *fi. fa.* lands to any other county, without a writ against goods there also; but both writs cannot run together in the same county.

In this case a *fi. fa.* goods had issued both to Wentworth, where the venue was, and to Hastings. That to Wentworth was returned *nulla bona*, and the plaintiff then issued a *fi. fa.* lands to Hastings, where the writ against goods was still current and a seizure had been made under it. *Held*, that the *fi. fa.* lands was irregular, and must be set aside.

*Read*, Q. C., during this term, obtained a rule *nisi* to set aside the *fi. fa.* lands in this case issued to the county of Hastings, on the ground that a *fi. fa.* goods was then in the hands of the same sheriff, and that both writs could not run together. He cited 43 Geo. III., ch. 1, secs. 1, 2; Consol. Stats. U. C., ch. 22, (C. L. P. A.,) sec. 252; Doe Jessup v. Bartlet, 3 O. S. 206; Gardiner v. Gardiner, 2 O. S. 571-3; McDade dem. O'Connor v. Dafoe, 15 U. C. R. 390; Doe Spafford v. Brown, 3 O. S. 95; Stevens v. Sheldon, Rob. & Har. Dig. 249; Moore v. Kirkland, 5 C. P. 457; Mandeville v. Nicholl, 16 U. C. R. 613; McMurrich v. Thompson, 1 P. R. 259.

*Freeman*, Q. C., shewed cause, and cited Jenkins v. Wilcock, 11 C. P. 508.

The facts of the case are stated in the judgment.

HAGARTY, J.—As I understand the point for decision, it is this—the venue in the action is in Wentworth. On the 26th of November the sheriff of that county returned a *fi. fa.* against goods and chattels *nulla bona*. A *fi. fa.* goods was then current in the county of Hastings, where the defendant Hawley resided, and a seizure of some goods had been made.

After the return of *nulla bona* in Wentworth, but during the currency of the writ against goods in Hastings, a *fi. fa.* lands was delivered to the sheriff of the latter county, who had thus at the same time an execution against goods and against lands against the same defendants, on the same judgment.

I understand it to have long been the practice, and I think it well founded, that after the regular issue and return of a *fi. fa.* against goods a *fi. fa.* lands may issue to any county, not merely to that in which the *fi. fa.* goods has been.

As *Draper*, C. J., remarks in *Jenkins v. Wilcock*, (11 C. P. 508:) "The law requires a *fi. fa.* against goods to be returned before a *fi. fa.* against lands can issue. Yet it has, I believe, been always considered sufficient to issue that writ to the sheriff of the county in which the venue is laid, though the defendants may not reside therein."

In the case cited of *Doe Spafford v. Brown*, (3 O. S. 95,) the late Chief Justice of this court says: "Under our provincial statute a *fi. fa.* against land cannot regularly be issued until on or after the return day of the *fi. fa.* against goods. We do not think that the statute is complied with by taking out a writ against goods and obtaining an immediate return of *nulla bona*, and issuing thereupon without delay a writ against the land, which would have no effect in giving time to the defendant, which the statute evidently intends, and which would subject the real estate to sale, notwithstanding the debtor might have goods to answer before the return day of the *fi. fa.* under which they might be seized and sold."

Since the change in the law as to the issuing and continuing in force for a year of writs of execution, some of the expressions in the older cases as to the return day must be modified.

The Common Law Procedure Act, Consol. Stats. U. C., ch. 22, sec. 252, enacts: "Goods and chattels, lands and tenements, shall not be included in the same writ of execution, nor shall any execution issue against lands and tenements *until the return of an execution against goods and chattels*; nor shall the sheriff expose the lands to sale within less than twelve months from the day on which the writ is delivered to him."

The 43 Geo. III., ch. 1, sec. 1, varies somewhat from this: "Nor shall any such process issue against the lands and tenements until the return of *the process* against the

goods and chattels." The Common Law Procedure section professes to be taken from this former act, but says, "until the return of *an* execution."

The statute allowing proceedings against shareholders in public companies for unpaid stock at the suit of judgment creditors, declares that the shareholders shall not be liable before an execution against the company shall have been returned unsatisfied in whole or in part, &c. *Macaulay*, C. J., remarked on this in *Moore v. Kirkland*, (5 C. P. 457:) "I think it forms properly a matter for the jury whether a return in form was such a return as the statute requires, namely, a return unsatisfied, not *pro formâ*, but after due diligence to realise the amount out of the effects of the company." *Draper*, C. J., notices this also in the case already cited of *Jenkins v. Wilcock*: "It is not to be a mere illusory formal proceeding, to give colour to proceedings against a shareholder." He then remarks as to the *fi. fa.* lands and goods as already noticed.

I draw attention to these cases as bearing on the question of the sufficiency of a return of *nulla bona* in the county where the venue is laid to warrant thereupon the issuing of writs against lands to any other county, without the necessity of a return to a *fi. fa.* goods from such other county.

The practice for years has, I believe, supported this course, but the present case is widely different. Conceding to the plaintiff his right, after the return of *nulla bona* to his *Wentworth* writ, to send his *fi. fa.* lands to *Hastings* at once, I am not prepared to allow him the extraordinary privilege in addition of issuing a *fi. fa.* goods to *Hastings*, making levy of part thereon, and during its currency also issuing execution process against lands.

The act of Parliament in my judgment was passed, as it were, in ease and favour of the debtor, compelling a resort to chattel property before real estate, forbidding the joinder of both in the one process, and giving time to the debtor. Such is its clear design and spirit, and in my judgment we should be doing violence thereto to hold that it is literally complied with, if *nulla bona* be once returned to an execution process. We should thus be allowing the same sheriff,

at the same moment, to have the same debtor's personal and real estate under seizure for the same debt. The chattel property is in actual custody, and the lands are bound by the writ, so as to prevent the debtor making title thereto or raising money thereon.

By sending the *fi. fa.* goods to Hastings to be acted on there, the plaintiff, as it seems to me, ties his hands as against the debtor's land in that county till his process against chattels be returned. I see no other way of carrying out what I believe to be the clear intention of the Legislature.

I also refer to the judgment of *Richards, J.*, in *Curry v. Turner*, (8 U. C. L. J. 296 ;) also to the note in *Rob. & Har. Dig.* 248 ; *Stevens v. Sheldon*, Trinity Term, 3 & 4 Vict., P. C., *Macaulay, J.*

In *Hodgkinson v. Whalley* (2 Cr. & J. 86) a levy had been made on a *fi. fa.*, and before its return a *ca. sa.* issued. On motion to set aside the *ca. sa.*, *Bayley, B.*, says: "No doubt both may issue together, because the practice is not to enter them on the record if nothing is done ; but if you execute one, you must make an entry of that return before you can award the other. Here there has been a seizure under the *fi. fa.* ; and if an action of trespass were brought for the seizure you would have to justify under the *fi. fa.* It is clear, on principle, that you cannot have two writs and act under both at the same time."

I may state that the affidavits have for some reason been not produced to us, since the argument, and that I take the facts as apparently agreed on by the counsel on both sides.

*Per cur.*—Rule absolute, without costs.

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## LOMAS V. THE BRITISH AMERICA ASSURANCE COMPANY.

*Insurance—Change and increase of risk—Construction of conditions—Pleading.*

To a declaration on a policy of insurance against fire, subject to certain conditions endorsed, defendants pleaded, first, that these conditions provided that in the assurance of buildings containing any furnace, &c., the construction of the same must be particularly described when effecting the insurance, or if subsequently introduced, due notice given to the company and the same sanctioned: that if after assurance the risk should be increased by any means within the control of the assured, or the premises occupied in any way so as to render the risk more hazardous than at the time of assuring, unless such alteration or addition should be allowed by endorsement on the policy, the assurance should be void. And defendants alleged that after effecting the insurance, the plaintiff made divers alterations and additions to the building, and in such additions introduced two furnaces, of which said furnaces being introduced defendants had no notice or knowledge, whereby the policy became void.

*Held*, on demurrer, plea bad, for the condition provided only against furnaces introduced into the building assured, not into additions made to it.

The second plea was, that after the policy divers erections, which were within the plaintiff's control, were added to the buildings insured, whereby the risk was increased, without the defendants' knowledge or consent.

To this the plaintiff replied, that by a condition of the policy, in case the risk should be increased by the erection of buildings, &c., it should be optional with the company to terminate the assurance: that the increase of risk was so occasioned, as alleged in the plea, and defendants did not terminate the assurance as provided for in the condition; and that said policy is valid and subsisting.

*Held*, that the replication was clearly bad, it being admitted, as stated in the plea, that defendants had no knowledge of the buildings being erected.

The plaintiff also took issue on this and other pleas. At the trial it was proved that an addition had been made, in which a boiler was placed, and steam carried thence into the main building, from which certain furnaces were then removed. The jury gave a verdict for the plaintiff on the second plea, and found that the external risk was increased, the internal risk diminished, and on the whole the risk diminished by the alterations. *Held*, that the plea was proved, and defendants entitled to have a verdict entered for them upon it, on leave reserved.

Thirdly, defendants pleaded, that by another condition all assurances, original or renewed, should be considered as made under the original representation, so far as it might not be varied by any new representation in writing, which in all cases it should be incumbent on the assured to make when the risk had been changed either within itself or by the surrounding or adjacent buildings; and defendants averred that although after the original representation new buildings were erected adjacent to and around the buildings insured, and although the risk was changed thereby, yet the plaintiff did not make to defendants any new representation in writing of such new buildings, or of the change of risk, whereby the policy became void.

*Per McLean, C. J.*, the plea shewed a good defence. *Per Hagarty, J.*, not, for the change here occurred before the time for renewing the policy, and the condition did not bind the plaintiff to make a new representation until then. *Sillem v. Thornton*, 3 E. & B. 368, distinguished, as the alterations there seemed to have been in progress when the policy was effected. The decision of the demurrers, however, was necessary only as regarded costs, for the judgment on the second plea determined the action.

DECLARATION on a policy of insurance against fire, subject to the conditions and stipulations endorsed thereon, from the 1st October, 1861, to the 1st of October, 1862, for \$750;

on stock consisting of wool, floating yarns, cotton warp, cloths, dye-stuffs, oil and soap, assured by the plaintiff, contained in a three-story brick building known as the Sherbrooke Woollen Factory, situate on the east side of the river Magog, in the town of Sherbrooke, Canada East. The plaintiff alleged a total loss, amounting to \$3000; and after setting out insurances on the same stock with other companies, of which the defendants had notice, he averred that he had observed and kept the conditions and stipulations of the defendants' policy, and was entitled to \$750.

*Pleas.*—1. That among the conditions and stipulations endorsed on the said policy in the declaration mentioned were the following: "Applications for assurance must be in writing, and specify the construction and materials of the building to be assured, or containing the property to be insured, by whom occupied, whether as a private dwelling or how otherwise, its situation with respect to contiguous buildings, and their construction and materials, and whether any manufactory is carried on within or about it. In the assurance of buildings which contain any steam-engine, furnace, kiln, stove, oven, or other instrument in or by which heat is produced (common fireplaces, stoves, and ovens in private use excepted,) the construction and circumstances of the same must be particularly described at the time of effecting the insurance, or if subsequently introduced due notice must be given to the company and the same sanctioned by them, otherwise the policy will be void; and in relation to the assurance of goods and merchandise the application must state whether or not they are of the description denominated hazardous, extra-hazardous, or included in the memorandum of special rates.

If any person assuring any building or goods in this office shall make any material misrepresentation or concealment, or if after assurance effected, either by the original policy or by the renewal thereof, the risk shall be increased by any means whatsoever within the control of the assured, or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of assuring, unless such alteration or addi-

tion shall be allowed by endorsement on this policy, and such increased premium paid as may be required, such assurance shall be void and of no effect." And the defendants say that after the making of the application by the plaintiff to the defendants for the said policy, and the making of the said policy by the defendants, the plaintiff was the tenant of the British America Land Company of the said building in the said policy mentioned, in which the said property of the plaintiff was contained; and being such tenant, the plaintiff made divers alterations and additions to the building so insured by the plaintiff with the defendants by the said policy, and in such additions to the said buildings after the making of the said policy divers, to wit, two furnaces (not being common fireplaces, stoves, or ovens in private use) by which heat was produced, were introduced, and that the plaintiff did not give notice to the defendants of the introduction of the said furnaces, nor did the defendants sanction the same, but the said furnaces were introduced without the knowledge or consent of the defendants, and thereby the said policy became void.

2. That the said conditions in the first plea mentioned were and are endorsed on the said policy, and that after the said application was made by the plaintiff, and the said policy made by the defendants, as in the first plea mentioned, divers erections and buildings were added to the buildings so insured by the said policy, and by such erections and buildings, which were within the control of the plaintiff, the risk of the defendants in the said insurance was increased, without the knowledge or consent of the defendants, and without any allowance thereof by endorsement on the said policy, whereby the said policy became void.

3. That among the conditions endorsed on the said policy, and which the said policy was made subject to, in addition to the conditions in the said first plea mentioned, was the condition following: "Assurances once made may be continued for such further time as may be agreed on, the premium required therefor being paid and endorsed on the policy, or a receipt given for the same; and all assurances, original or renewed, shall be considered as made under the original re-

presentation, in so far as it may not be varied by any new representation in writing, which in all cases it shall be incumbent on the party assured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings." And the defendants say that before the making of the said policy an application was made by the plaintiff to the defendants in writing for the said insurance and policy, and in such application the situation of the said buildings so to be insured was represented and described, and such representation and description were material to the defendants; and the defendants say that although after such representation and the making of the said policy new and additional buildings were erected, which were adjacent to and around the said buildings so insured, and although the risk to the said buildings so insured was changed thereby, yet the plaintiff did not make to the defendants after such risk was so changed, or at any time, any new representation in writing of such new and additional buildings, or of the change of risk thereby, whereby the said policy became void.

*Demurrer* to the first plea, on the ground that the introduction of the furnaces into the additions to the buildings in the first plea mentioned was not a breach of the conditions in the said plea mentioned, and also that it is not averred in said plea that the risk was in any respect increased.

*Replication* to the second plea, that the condition endorsed on the said policy mentioned in the said second plea, in addition to the terms set forth in the first plea of the defendants and referred to in the said second plea, contains the following terms and conditions: "If during the assurance the risk be increased by the erection of buildings, or by the use or occupation of neighbouring premises or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the assurance, and upon tender of the amount of the premium for the remainder of the current term of the policy to the assured or his representative, (whether accepted or not,) with a written notification of the determination of the company to cancel the policy, the same shall have no further force or effect, and

be cancelled accordingly." And the plaintiff says that the increase of the risk complained of by the defendants in the said second plea was occasioned, as is averred in that plea, by the erection of buildings; and the plaintiff avers that the defendants did not terminate the assurance in the manner provided for in the said condition, and that the said policy is a valid and subsisting policy.

*Demurrer* to the third plea, on the ground that the representation originally made is binding on an applicant for insurance or on an applicant for a renewal of an existing policy only, and also that by the condition of the policy as set forth in the replication to the second plea there is special provision made with respect to any change of risk caused by the erection of buildings.

*Demurrer* to the replication to the second plea, that the said condition set out in the said replication is a distinct condition, and is not a limitation or modification of the condition set out in the defendants' second plea, and that the said replication is no answer to the said second plea.

Besides demurring to the first and third pleas, the plaintiff took issue upon them, and he took issue also on the second plea, in addition to the special replication to it, which was demurred to.

At the trial, at Guelph, before *Richards, J.*, it appeared that after the insurance a wooden building, 30 feet by 40, was put up, a boiler placed there, and steam carried from it into the building insured, from which certain furnaces and kettles were then removed. Of this and other minor alterations the defendants had no notice.

It was left to the jury to say whether the alterations and additions which were proved to have been made had, on the whole, increased the risk, whether the external risk was increased and the internal risk diminished by them.

A verdict was rendered for the plaintiff on the second issue, and \$750 damages, and damages were assessed on the demurrer to the first and third pleas, and a verdict rendered for the defendants on the issues taken on these pleas. The jury found that the external risk was increased, the internal risk diminished, and on the whole the risk diminished by

the alterations. Leave was reserved to the defendants to move to enter a verdict for them on the second plea.

*Cameron*, Q. C., obtained a rule *nisi* accordingly, and the demurrer and rule were argued together during last term.

*Galt*, Q. C., and *Anderson*, for the plaintiff, cited *Stokes v. Cox*, 1 H. & N. 320; S. C. in Ex. Ch., *Ib.* 533; *Baxendale v. Harvey*, 4 H. & N. 533; *Glen v. Lewis*, 8 Ex. 607; *Sillem v. Thornton*, 3 E. & B. 868; *Shaw v. Roberds*, 6 A. & E. 75; *Pim v. Reid*, 6 M. & G. 1.

*Cameron*, Q. C., contra, cited *Reid v. The Gore District Mutual Fire Insurance Co.*, 11 U. C. R. 345; *Merrick v. Provincial Insurance Company*, 14 U. C. R. 439; *Dobson v. Sotheby, M. & M.* 90; *Glen v. Lewis*, 8 Ex. 607.

McLEAN, C. J.—The defendants by their first plea do not allege that the policy became void by reason of the alterations and additions to the building being made without the knowledge or consent of the defendants, and without being endorsed on the policy as required by the condition, nor does it allege that the risk was in any way so increased as to make it more hazardous than at the time of assuring. The only ground on which the policy is alleged to be void is the introduction *into such additions* to the building of two furnaces without notice to the defendants, and without their sanction being obtained in manner required by the condition endorsed on the policy. The increase of risk by the erection of buildings after the insurance was effected gave the defendants the option of continuing the risk or terminating the assurance, as they might think most advisable, and as they had a right to elect the course they might choose to take, if due notice were given to them of the erection of the building, they might in the exercise of their discretion have chosen to continue the assurance, in which case the introduction of the furnaces into the additions would not render the policy void.

The first condition states that “in the assurance of buildings which contain any steam-engine, or other instrument in or by which heat is produced, (common fireplaces, stoves, and ovens in private use excepted,) the construction

and circumstances of the same must be particularly described at the time of effecting the insurance; or if *subsequently introduced*, due notice must be given to the company, and the same sanctioned by them, *otherwise the policy will be void*. This refers to the introduction of any steam-engine or instrument by which heat is produced into *the building assured* after the assurance has been effected. The introduction of furnaces or steam-engines producing heat into a new building, though connected with the building assured, would not therefore necessarily render the policy void under that condition. That, however, is the allegation in the plea, and upon that fact the policy is therein stated to be void.

As the premises do not warrant the conclusion, I think the plea not sustainable, and that upon the demurrer to it judgment must be for the plaintiff.

The replication to the second plea, which is demurred to by the defendants, is clearly bad; for though the company did not exercise the option of cancelling the policy by reason of the erection of buildings, there is nothing in the replication to shew that they had notice of such a proceeding, or that they were aware that any cause existed for acting upon the condition referred to. The defendants allege that the buildings by which the risk was increased were put up by the plaintiff without their knowledge or consent, and the plaintiff does not deny the statement; on the contrary, he admits in the replication that they were so erected, and that the increase of risk complained of was occasioned by their being erected.

The plaintiff thus endeavours to meet the allegation that the policy has become void by setting up a condition which he admits to have been broken, and on which the company might in their discretion have declared the policy void, if the plaintiff had given notice, as he was bound to do, of the erection of the buildings, and the increase of risk thereby.

Had such notice been duly given according to the condition, the defendants might have still continued the policy on receiving an additional amount of premium, or if they had taken no action on the receipt of such notice until the fire occurred, it might with some propriety be urged that they

had waived the option reserved in the condition, and that the policy must still be considered a valid and subsisting policy. The defendants were not bound to watch the building insured to see if any additions were made to it. It was the duty of the plaintiff to give notice of any change or increase of risk arising from the erection of new buildings or from any other cause.

It was admitted as a matter of fact on the trial, that after the making of the policy, and before the fire, a considerable addition was made to the building insured by the erection of a wooden building, in which was a furnace and boiler, which were introduced subsequently to the making of the policy; and that no notice thereof was given to the defendants, nor was their sanction thereto ever obtained. The replication being bad, the defendants are entitled on the facts as well as on the law to succeed on the second plea, and to have a verdict entered for them.

The plaintiff has taken issue on and demurred to the third plea.

On the issue a verdict has been rendered for the defendants, and if the plea is good the verdict cannot be disturbed. Some of the former conditions, by which it is alleged the policy became void, relate to the increase of risk without notice or sanction, but this relates to a change of risk by the addition of new buildings. Under this condition the increase or decrease of risk could not come in question. The change by any means rendered it necessary that a new representation should be made to the insurers.

When a policy is taken a representation of the state of the premises on which insurance is desired must be made, to enable the insurer to decide what rate of premium it may be proper to charge, and when such policy is renewed the original representation is considered as still subsisting unless it is varied in some way at the time of the renewal. Such representation, under the condition stated in the third plea, is considered in force and binding on the party insured during the existence of the policy, unless the risk be increased or changed; and in the latter case the condition mentioned in the third plea makes it incumbent on the party assured

to make a new representation when the risk has been changed, either within itself or by the surrounding or adjacent buildings.

The defendants had an undoubted right to attach such a condition to their policy, and there is nothing unreasonable in requiring from a party insured a rigid compliance with it. They have a right to know whether any change of risk has taken place since the policy was issued, whether increased or not, and that information the plaintiff when he accepted the policy undertook to furnish as soon as such change took place. The plaintiff may have thought that the wooden buildings which he erected as additions to the buildings on which his property was contained did not increase the risk, and he may have satisfied himself, as the jury seem to have done on the trial, as they have found that externally the risk was increased but internally diminished, upon the whole that the risk was diminished; but he would hardly contend that there was not a *change* of risk both *externally* and *internally* of which no representation had been made to the defendants, though it is by the condition referred to declared to be incumbent on the party insured to make a new representation of such change. If a representation had been made shewing a change of risk, the defendants would have had such notice as would induce inquiry, and they would be entitled to exercise the discretion of terminating or continuing the risk.

On the second plea I think the defendants are entitled, pursuant to their motion on leave reserved, to have a verdict or nonsuit entered, so that the third plea is of no great importance, but I think it shews a valid ground of defence, and that the verdict for the defendants should not be disturbed.

The plaintiff seems to have been indifferent about, or at all events regardless of, the conditions of his policy; and though he has in his declaration acknowledged that it was subject to certain conditions, and has averred that he has well and truly observed and kept them all, the evidence is such as to lead to the conclusion that he, the plaintiff, must have forgotten that there were such conditions, or must

have imagined that he could do as he pleased with the building in which his goods were contained without affecting his insurance on them.

HAGARTY, J.—In this case a policy was effected by the landlord, Mr. Heneker, on the building, and by the present plaintiff, Lomas, on the stock therein. Actions have been brought by each of these parties. The landlord's action is in the Court of Common Pleas, on pleadings almost the same as those before us; both actions have been tried, and the same evidence given in both.(a)

The facts are very simple. The plaintiff in this suit (the tenant) made certain additions to the woollen factory, and in the new part introduced two furnaces. No notice was given to defendants, nor any consent obtained therefor. The jury found in each case that the external risk was increased, the internal risk diminished, and on the whole the risk was diminished.

I think that the second plea, setting up the additions made to the insured premises with the plaintiff's assent, and under his control, causing an increase of risk, without notice to or assent of defendants, was proved, and is a full bar to the action.

The replication setting up what I think a wholly distinct condition, in no way affecting the condition on which the plea is founded, is clearly bad, and defendants entitled to judgment thereon.

This disposes of the action, and entitles defendants to the *postea*. The other issues in law and fact require decision merely as to costs.

I think the first plea bad on demurrer. It sets out a condition as to the introduction of furnaces, and does not bring its facts within its terms, which only refer to such introductions into the assured premises, and not into substantial additions made thereto. The latter are provided for in other conditions.

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(a) The case in the Common Pleas was also decided in this term. The court there made the rule absolute for a nonsuit. As to the demurrers, they agreed with this court in holding the first plea and replication to the second plea bad, and with the view taken by Mr. Justice Hagarty as to the third plea.

The third plea is also in my opinion bad. No objection is stated to the original representation in writing, and the loss occurred before the time arrived for a renewal of the assurance. The plea assumes that as soon as any additions were made, the policy being current, it was necessary for the plaintiff to make them the subject of a new representation in writing; or, in other words, that as soon as the additions or alterations were made, the original representation ceased, as it were, to be true.

I think I can decide this plea to be insufficient, without affecting the decision in *Sillem v. Thornton*, (3 E. & B. 868.) There the alterations would seem to have been in progress at the very time the policy was entered into and risk undertaken. I do not consider that in so deciding we in any way refuse effect to the eleventh condition of the policy.(a) I incline to think that this condition only provides for the representation or application made in the effecting or renewing of the policy. In the event of a change of risk by alteration, &c., ample protection is given to the underwriters by the several provisions of the first condition, to some of which the second plea applies, and fully covers the ground of defence really available to defendants.

Rule absolute to enter a verdict for defendants on the second plea; judgment for defendants on demurrer to the replication thereto; and judgment for the plaintiff on demurrer to the first plea.

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(a) The condition referred to in the third plea.

THE PROVISIONAL CORPORATION OF THE COUNTY OF BRUCE  
V. ROBERT CROMAR.

*Bond to account and 'pay over on demand—Construction of—Sufficiency of demand on one of three executors.*

The defendant bound himself that one G. C., his executors or administrators, at the expiration of his office as treasurer, upon request to him or them made should give to the plaintiffs a just account of all such moneys as should come into his hands, and should pay and deliver over to his successor in office, or any other person duly authorised to receive the same, all balances due by him to the plaintiffs.

One of the breaches assigned in an action on this bond was, that although a large sum was due at the expiration of his office, and a successor duly appointed, and although duly requested so to do, yet neither G. C., nor his executors or administrators, had paid the same. To this the defendant pleaded that the plaintiffs did not request G. C., or his executors, or either or any of them, to pay.

*Held*, a good defence; for the words in the condition, "upon request to him or them made," applied both to the giving an account and to the paying over.

At the trial it appeared that defendant was one of three executors of G. C.; but that he did not act in the affairs of the estate, and lived at some distance; and that a request to pay over all moneys, &c., had been made upon the other two executors, but not on him. It was admitted, however, that all the executors had been sued on this bond, and served with process and declaration before the commencement of this action.

*Held*, that the demand was sufficient.

*Per Hagarty, J.* *Quære*, whether as a general rule, when a demand upon executors is necessary it must be made upon all. *Semble*, not in order to support an action on a contract of the testator, but that a demand upon one would be insufficient to cast any new or personal liability on another executor.

A bond to "The Provisional Municipal County Council of the County of Bruce," "The Provisional Corporation of the County of Bruce," being the proper corporate name, *Held*, sufficient.

DECLARATION, for that the defendant, on the 11th of January, 1860, by his bond became bound to the plaintiffs by and under, and using the name of "The Provisional Municipal County Council of the County of Bruce," in the penal sum of £1000, of lawful money of Canada, to be paid by the said Robert Cromar, his heirs, executors, and administrators, unto the plaintiffs or their successors in office, subject to a condition, whereby—after reciting that one George Cromar had been chosen and appointed Provisional Treasurer of the Provisional County Council of the County of Bruce, by reason whereof divers sums of money, goods and chattels, and other things the property of the said Provisional County Council, would come into his hands—the condition of the said bond was declared to be, that if the

said George Cromar, his executors or administrators, at the expiration of his said office, upon request to him or them made should make or sign unto the said Provisional County Council, their successors in office, or their agent or attorney, a just and true account of all such sum or sums of money, goods and chattels, and other things as might come into his hands, charge, or possession as provisional treasurer as aforesaid, and should and would pay and deliver over to his successor in office, or any other person duly authorised to receive the same, all balances or sums of money, goods and chattels, and other things which should appear to be in his hands and due by him to the said Provisional County Council; and if the said George Cromar should well and truly, honestly and faithfully in all things serve the said Provisional County Council in the capacity of provisional treasurer as aforesaid during his continuance in office, then the said bond should be void, else to remain in full force and virtue.

The breaches assigned were—1st. That the said George Cromar, his executors or administrators, did not, nor did any or either of them, at the expiration of his said office, make or give unto the plaintiffs, or unto their agent or attorney, a just and true account of all sum or sums of money, goods and chattels, and other things which came into his hands, charge, or possession, as provisional treasurer as aforesaid, although duly requested so to do. 2nd. That although as such treasurer as aforesaid divers large sums of money, to wit, £1000, were paid to and received by the said George Cromar as such treasurer as aforesaid, and at the expiration of his said office the said sums of money remained and were unpaid by the said George Cromar, his executors or administrators, or any other person or persons, to the plaintiffs; and although a successor in office was duly appointed to the said George Cromar, and although duly requested so to do, yet nevertheless the said George Cromar, nor his executors or administrators, nor the defendant, nor any other person or persons paid and delivered over to the said successor of the said George Cromar in the office of treasurer as aforesaid, or to any other person duly authorised to receive the same, or to the plaintiffs, all balances or

sums of money which were in the hands of the said George Cromar as such treasurer as aforesaid, and due by him to the said plaintiffs at the expiration of his said office.

*Ninth plea*, to the second breach, that the said George Cromar continued provisional treasurer as alleged from the day of the date of the execution of said bond till the period of his decease, to wit, the 15th of June, 1860, which was the day on which his said term of office expired. And the defendant avers that the plaintiffs did not on the said 15th day of June, in the year last aforesaid, or at any time since, request the said George Cromar, or his executors or administrators, or either or any of them, to pay and deliver over to the successor in the office of treasurer of the said George Cromar, or to any other person duly authorised to receive the same, or to the plaintiffs, the balances or sums of money alleged to be in the hands of the said George Cromar as such treasurer as aforesaid, and alleged to be due by him to the said plaintiffs at the expiration of his said term of office.

To this the plaintiffs demurred, on the following grounds :

1. That the said plea raises immaterial issue.
2. That the bond sued upon, as appears from the declaration, was absolutely conditioned that George Cromar, his executors or administrators, should and would pay and deliver over to their successors in office, or any other person duly authorised to receive the same, all balances or sums of money, goods and chattels, and other things which should appear to be in his hands and due by him to the said provisional council, and nothing is said as to a previous request being necessary, and no previous request was in fact necessary.
3. That the said plea is no answer to the part of the declaration to which it is pleaded.

Besides demurring to this plea, the plaintiffs took issue upon it.

At the trial, at Goderich, before *McLean*, C. J., it was objected that the bond was not to the plaintiffs in their proper corporate name.

It being also objected that no demand or request was

proved on the deceased treasurer or his executors, the present treasurer, Corrigan, was called. He said that Wm. Rastall, Alexander Shaw, and Robert Cromar were executors of the late George Cromar: that he, witness, was instructed to get from the executors everything which the deceased had at his death belonging to the municipality: that he called on Shaw and Rastall and told them of his directions. They gave up all the books belonging to the office, and afterwards authorised the witness to receive \$3553,57c. deposited in the bank, and afterwards they paid him \$37. He made no demand on Robert, the defendant, who was not acting in the affairs of the estate, and was living at a considerable distance.

It was admitted that a writ had been served on the three executors on the 23rd of June, 1862, for breaches of this bond, and a declaration about the 29th of August, all before the suit commenced.

A verdict was taken for the plaintiffs for \$1136, leave being reserved to move for a nonsuit on the objections taken.

*Eccles*, Q. C., during last term, obtained a rule *nisi* to enter a nonsuit pursuant to leave reserved, or for a new trial on the law and evidence, to which in the same term

*Robert A. Harrison* shewed cause, citing *Broom* Leg. Max. 456; *Keyworth v. Thompson*, 16 U. C. R. 173; *Brock District Council v. Bowen*, 7 U. C. R. 471; *Fisher v. The Municipality of Vaughan*, 10 U. C. R. 492; *Barclay and The Municipal Council of Darlington*, 11 U. C. R. 470; *Hawkins v. The Municipal Council of the United Counties of Huron, Perth, and Bruce*, 2 C. P. 72; *McDonell v. The Beacon Fire and Life Assurance Co.*, 7 C. P. 310; *The Trent and Frankford Road Company v. Marshall*, 10 C. P. 336; *Trustees of School Section No. 3, of Caledon, v. The Corporation of Caledon*, 12 C. P. 301; *McFarland v. Crary et al.*, 8 Cowen, 253.

The demurrer and rule were argued together.

McLEAN, C. J.—The defendant became bound as surety that George Cromar, his executors or administrators, at the

expiration of his said office, upon request to him or them made should do certain things, and it is for not doing certain portions of these things specified in the breaches assigned that this action is brought. The plaintiffs have alleged that the executors were duly requested to do the things which the defendant became bound they would do upon request to them made, and the defendant in the ninth plea denies that any request was made to the said George Cromar on the 15th day of June, 1860, when his term of office expired by reason of his death, or at any time since to his executors or administrators.

As surety he was not entitled to any request before action; but he was only bound that George Cromar, his executors or administrators, should do certain things at the expiration of his term of office as provisional treasurer upon request to him or them made, and I think before any action against the defendant can be sustained there must be default on the part of the deceased, Cromar, his executors or administrators, after request to him or them to do the things which the defendant is responsible for their doing.

The plaintiff has demurred to the plea, as not good in substance—first, because the plea raises an immaterial issue. It is an issue tendered by the plaintiffs in their declaration, by the allegation that a request to pay over and deliver moneys and other things in the hands of the said George Cromar, and due at the time of the expiration of his said office, was duly made, but that neither the said George Cromar nor his executors or administrators, nor the defendant, nor any other person or persons, paid and delivered over to the plaintiffs, or any other person duly authorised to receive the same, all balances and sums of money in the hands of the said George Cromar as treasurer at the expiration of his said office.

I cannot look upon the plea as raising an immaterial issue, because the plaintiffs had no right to call on the defendant till they had first called on the personal representatives of George Cromar to pay over and deliver to the newly-appointed treasurer, or any person authorised to receive the same, all such moneys or other things as he had at the

expiration of his office in his hands belonging to the plaintiffs.

The ground of demurrer is, that the bond sued on was conditioned absolutely that George Cromar, his executors or administrators, should and would pay and deliver over to his successor in office, or any other person duly authorised to receive the same, all balances or sums of money, goods and chattels, and other things which should appear to be in his hands, and due by him to the said provisional council, and that nothing is said as to a previous request being necessary, and that no previous request was in fact necessary.

I do not know what is meant by this ground of demurrer, because, according to the condition of the bond as set out, the defendant is only bound that George Cromar, his executors or administrators, at the expiration of his said office shall upon request to him or them made do certain acts, and a request is expressly alleged in the declaration to the executors to do the acts which the breaches allege they have not done. Perhaps it may be intended to argue that the request was only necessary as to some of the acts to be done by the executors or administrators, but not necessary to precede an action for payment of any money due. If so, then I think that ground of demurrer fails, as I think the request applies to all that the defendant became bound the executors would do.

The plea is an answer to that part of the declaration which alleges a request; and as a request was necessary before action against the surety, it forms a good answer to this action, and I think the plaintiffs must succeed on the demurrer.

But issue has been also taken on the plea; and as to that, it was proved on the trial before me at Goderich, at the last fall assizes, that the defendant was not acting in the affairs of George Cromar, and that a request was made before action brought to two of the executors, William Rastall and Alexander Shaw, to pay over all moneys, and deliver up all goods and chattels, or other things in the hands of George Cromar at the time of his death. These executors then arranged with the successor in the office of treasurer for a consider-

able amount in money, which was duly paid over by the Bank of Upper Canada, in which it had been deposited, and they paid a smaller sum subsequently. This request, I think, must be considered sufficient to the executors who appear to have been in charge of the assets of the estate, and they must be presumed to have communicated it to the defendant, who is the only other executor. Besides, it was admitted that an action had been brought, and that all the executors had been served with process about the 23rd of June, 1862, and with declaration about the 28th of August, before this action against defendant as surety was commenced. Under these circumstances, I think that a sufficient request to the executors has been proved, and that the verdict for the plaintiffs cannot be disturbed.

HAGARTY, J.—I am of opinion that the defendant is entitled to judgment on demurrer to his plea. I think his construction of the condition is correct, and that the words, “upon request to him or them made,” apply to the paying over the moneys, &c.

The cases most analogous are, I think, those arising on the construction of covenants, whether the restrictive words at the commencement of several covenants relating to the same subject-matter apply to each of the things covenanted to be, or to be done. Many examples will be found in Mr. Rawle’s work and in English conveyancing books.

Independently of authority, I think the grammatical construction of the whole sentence is in favour of the defendant’s view.

Then with regard to the rule moved, the first difficulty is as to the variance in the name. The correct designation is, as in this cause, “The Provisional Corporation of the County of Bruce.” The bond is to “*The Provisional Municipal County Council of the County of Bruce*,”—in fact, for the proper word “*Corporation*” substituting “*Municipal County Council*.”

The bond was made in January, 1860. Chapter 54 of the Consol. Acts U. C., sec. 5, in force at that date, provides for the name. “The inhabitants of every junior county upon

a provisional council being or having been appointed for the county, shall be a body corporate under the name of *The Provisional Corporation of the County of*," (naming it.) Sec. 6. "The powers of every body corporate under this act shall be exercised by the council thereof."

Sec. 159. Every council shall appoint a treasurer, &c., and every treasurer shall give such security as the council directs. Sec. 160. The treasurer shall receive and safely keep all moneys belonging to the corporation, &c.

In 1858, the Municipal Act, 22 Vict., ch. 99, declared to come into force on the 1st of December, 1858, gives the same corporate name.

An act passed on the 26th of March, 1859, 22 Vict., ch. 7, speaks, in sec. 10, of a by-law of "*The Provisional Municipal Council of the County of Bruce*." The earlier acts also provided that the inhabitants of every county should be a body corporate, and their powers be exercised in the name of the municipal council of such county.

If I were called on to decide this point as a "*res integra*," not affected by precedent, I could hardly see my way to holding any deed or security available, if taken in a name varying from that expressly allowed by law. The only body known to the law is the body created and specially named by the law, and it seems to be the destruction of all precision or certainty to allow any material variance therefrom.

But the authorities are numerous against this first impression. In *Trent and Frankford Road Company v. Marshall*, (10 C. P. 336,) the action was brought by the Trent and Frankford Road Company. The bond sued on was to "The President and Directors of the Trent and Frankford Road Company." The court considered the authority of *Brock District Council v. Bowen*, (7 U. C. R. 471,) and *Hawkins v. The Municipal Council of Huron, Perth, and Bruce*, (2 C. P. 72,) as decisive against the objection.

In the first-mentioned case the plaintiffs were "The Council of the District of Brock." The bond sued upon was to "The Municipal Council of the Brock District." This was held sufficient, as the court considered the two names the

same in effect, and the declaration averred that the defendants made their bond to them, the plaintiffs.

In the case in 2 C. P. 83, the late very learned Chief Justice of that court says: "Many cases shew that literal variances in the use of corporate names, if substantially correct, are immaterial." The case before him was on a by-law. He says, "We are not to try its validity under such objections as if they were special demurrers to pleas in abatement." After citing many cases he says, "The objections" (in the cases) "relate principally to deeds and conveyances."

In the same case an elaborate judgment of *Sullivan, J.*, reviews many cases on corporation misnomers.

I may also refer to the case in 10 Coke, 122 *b*, of the Mayor and Burgesses of Lyme Regis, and the very learned notes thereto, giving a vast number of such cases.

Mr. Eccles argued that the variance is substantial: that by the statute the inhabitants of the county form the corporation, and that here it is to the Municipal Council that the obligation is as a corporate body. On this it may be remarked that before the late change in the law, as after, the inhabitants were declared to be the corporation, and the corporate powers were exercised in the name of the council.

To notice one of the many cases in the books, *The Attorney-General v. The Mayor of Rye*, (7 Taunt. 548,) a devise of land was held good to The Right Worshipful the Mayor, Jurats, and town council of the ancient town of Rye, the true corporate name being "The Mayor, Jurats, and Commonalty of the ancient town of Rye." *Gibbs, C. J.*, says, "The cases cited shew that if an intent appear to give to the corporation of Rye they shall take, though ill-named. . . . We think that an intent does appear to give to a body which could hold in perpetuity, and to give to a corporation. There is this corporation, and there is no other corporation of any similar description; and we therefore think the Mayor and Corporation of Rye are entitled to recover."

This was on a will, but a large number of the cases are on leases, &c.

The canon often quoted from 10 Coke, 122 *b*, is, "The name of a corporation in grants or conveyances need not be *idem syllabis seu verbis* ; it is sufficient if it be *idem re et sensu*."

I repeat that on the authority of the cases I do not see that I can give way to this objection.

I have had some difficulty with the other objection.

I have not seen any direct authority as to the sufficiency of a demand or request made on any one or two only of three executors, when a demand was necessary.

Here the condition is, that the treasurer, his executors or administrators, should on request to him or them made deliver papers and pay over moneys, &c.

The defendant objecting here is surety for the deceased treasurer, and also one of his three executors. A demand or request is proved on the other two executors, and it was said that the defendant was not acting in the affairs of the estate, and was living at a considerable distance. It was also shewn that prior to the commencement of this suit a writ and declaration had been served in a suit brought against the defendant and his two executors for breaches of this bond, as executors of the deceased treasurer.

My impression is that any evidence as to the proceedings in the other action can hardly help the present difficulty. For aught that I know a defence like this may have existed and been relied on in that suit.

Here the surety says, "My engagement was, that my principal or his executors would deliver over all his books, &c., and pay over all moneys in his hands belonging to the county, when requested so to do. You do not pretend that you ever made such request on him when alive. I am one of his executors, and you never requested me to do either of these things."

The case, I think, must depend on the sufficiency of the request made on the two executors.

In Sheppard's Touchstone, 584, it is said, "All the executors, where there be more than one, be they never so many, in the eye of the law are but as one man, in which respect the law doth esteem most acts done by or to any one of them, as acts done by or to all of them."

In Williams on Executors, 5th ed. 1649-50: "The circumstance that one of two co-executors had notice of the existence of a debt of superior degree, which he concealed from his co-executor, shall not affect the latter so as to make him guilty of a *devastavit* by paying an inferior debt; though, perhaps, if notice to one executor be proved, and nothing more appears, it shall be presumed that he communicated it to his co-executor."

The case cited in support of the first proposition, Hawkins v. Day, (Ambler, 162; 1 Dickens, 157,) does not throw much light on the point before us. Lord *Harkwicke* says, "Objection, that two of the executors had notice; but that is not sufficient to affect Day" (the other executor) "with notice, because they concealed it from him. . . . Executors are not affected by each other's acts. Suppose the two executors had been strangers to the transactions, as the third was, notice to them might affect the third, because it might be presumed they acquainted him with it; but give no opinion on that."

In a case of Timson v. Ramsbottom, (2 Keen, 53,) the Master of the Rolls says, "I think, after a good deal of hesitation, that the knowledge of one of several executors, who was interested, and does not appear to have communicated his knowledge to his co-executors, is not sufficient." This was a case of notice of an assignment to one executor of an interest in the testator's reversionary estate, and the contest was between this assignment and another made to a third person after the first executor had died.

Many cases are to be found on this branch of the law. They are noticed by *Westbury*, C., in Willes v. Greenhill, (7 Jur. N. S. 1134,) and the principle may be shortly stated: Notice to one trustee of an assignment by *cestui que* trust is sufficient, "because a subsequent encumbrancer or assignee would be under an obligation to inquire of every one of the trustees, and therefore he would have to inquire of the one to whom notice had been given." See also Browne v. Savage, (5 Jur. N. S. 1020;) Sneesby v. Thorne, (7 De G. MacN. & G. 399.)

In Nation v. Tozer, (1 Cr. M. & R. 174,) *Parke*, B., says,

"The question is, whether the act of one in taking possession of a chattel real or personal of the testator, can create a new liability and impose a charge on the other executor personally, and in his own individual character, which without such act would never have existed; and we think it cannot. . . . If one executor enter and enjoy the land demised and take the profits beyond the rent, the other executor would not be chargeable with the amount as assets to the creditors, the one who actually received would alone be responsible. In respect then to the creditors, the actual possession and use by one is not in law the possession and use by both, so as to attach a liability upon both."

In the case before us we have come to the conclusion that an action would not accrue upon the bond against the treasurer till failure to account and pay over on notice and demand. Of course his surety would only be liable when the principal had thus become in default. The principal dies before any demand or default, his three executors represent him, and before the action lay against them or his estate represented by them notice and demand should be made on them. I presume that on such demand being made, if any executor had delivered the books, &c., and paid the money due, the claim would be satisfied and the bond be not forfeited.

The defendant here is a co-executor; he is also surety and an obligor in the bond. He says no demand or request was ever made on him, he being an executor.

I have searched through several works on bills and notes as to the kind of notice required to be given to personal representatives of a party to a bill or note who died before the making. I can find nothing beyond the assertion that notice should be given to the executors or administrators.

But, on the whole, I think, after considerable hesitation induced by the absence of direct authority, that the right conclusion to arrive at is that in this action the defendant is sued as a surety and not as an executor, and that, so far as he is concerned, a notice and demand on two of the three executors may be considered as a sufficient notice and demand on the estate of the deceased treasurer. Con-

ceding that notice to one may not be sufficient to cast any new or personal liability on another executor, I think it may be held that where a notice is to be given to a man or his executors or administrators previous to his being called on to answer some liability which he has contracted, and not for the purpose of creating some new liability, it will suffice to do as was done in the case before us.

I therefore think the rule should be discharged.

Rule discharged.

### THE QUEEN V. WENTWORTH DAWES.

*Exemption from toll—Officers—Mutiny Act, 25 Vict., ch. 5—Consol. Stats. U. C., ch. 49, sec. 91.*

The defendant coming in a private carriage to a toll-gate on the Blackfriars road, near London, refused to pay, and passed through, on the ground that he was in uniform, and adjutant of the military train, and was therefore exempt. Being brought up before a magistrate, he claimed exemption under the Mutiny Act, and was convicted for wilfully passing the gate without paying.

*Held*, that the conviction was proper, for by the Mutiny Act, 25 Vict., ch. 5, sec. 72, he was exempt only if on duty, of which there was no evidence, and being in a private vehicle he was expressly excluded from exception under the Joint-Stock Companies Act, Consol. Stats. U. C., ch. 49, sec. 91.

*Held*, also, that the conviction could not be quashed on the ground of his being on duty, as the exemption had not been claimed on that account.

*Held*, also, no objection that the toll-gate did not appear by the conviction to be lawfully established.

THIS was an application to quash a conviction of defendant for passing a toll-gate without paying, which was as follows:—

PROVINCE OF CANADA,	}	Be it remembered that, on
COUNTY OF MIDDLESEX,		

the twenty-sixth day of June, A.D. 1862, at London, in the said County of Middlesex, Wentworth Dawes is convicted before the undersigned, one of her Majesty's Justices of the Peace for the said county of Middlesex; for that the said Wentworth Dawes did, on the twenty-third day of June, 1862, wilfully pass toll-gate No. one, on Blackfriars road, in the township of London, in the said county of Middlesex, without first paying the legal toll for travelling on such road, payable at the toll-gate, he, the said Wentworth Dawes, not being by law exempted from paying toll thereat. And I adjudge the said Wentworth Dawes, for his said offence, to forfeit and pay a fine of

twenty cents, to be paid and applied according to law, and also to pay the sum of three dollars and ninety-five cents for costs in this behalf; and if the said several sums be not paid to me forthwith, I hereby order the same to be levied by distress and sale of the goods and chattels of the said Wentworth Dawes; and in default of sufficient distress in that behalf, I adjudge the said Wentworth Dawes to be imprisoned in the common gaol of the said county of Middlesex for the space of ten days, unless the said several sums, and all costs and charges of the said distress, and of the commitment and conveying of the said Wentworth Dawes to the said common gaol, shall be sooner paid.

Given under my hand and seal, this twenty-sixth day of June, in the year of our Lord one thousand eight hundred and sixty-two, at London, in the said county of Middlesex.

JAMES OWREY, J. P. [L. S.]

The following was the evidence returned with this conviction, under *certiorari* :—

*Nathaniel Spence*, sworn and saith—That on the evening of the twenty-first day of June, A.D. 1862, about a quarter to eight o'clock, Wentworth Dawes came along Blackfriars road, up to toll-gate No. one, in a private carriage drawn by two horses. His wife and servant were also in the carriage: his servant was dressed in civilian's dress: Mr. Dawes was in uniform: I demanded toll: Wentworth Dawes said he was in uniform, and that he was adjutant of the military train, and was therefore exempt from payment of toll: I did not know his name at the time: I asked him his name: he replied he was adjutant of the military train: Mr. Dawes passed through the gate, but would not pay toll.

The defendant offered no evidence, but claimed exemption from payment of toll under the Mutiny Act.

*A. Kirkpatrick* obtained a rule *nisi* to quash this conviction on some technical objections, which will be found stated in the judgment, pages 338-9, and on the ground that Mr. Dawes was, under the circumstances, exempted from payment of toll. He cited Dickinson's Quarter Sessions, 876, 878.

*Richards*, Q. C., shewed cause.

The statutes cited are referred to in the judgment.

McLEAN, C. J.—The convicting justice of the peace has

made a return to the *certiorari* issued in this case, and has sent, under his seal, a copy of the conviction, and of the testimony taken before him, on which it is founded. It does not appear whether the road on which the toll was exacted was originally constructed by a joint-stock company or by the local municipality. No question was raised at the time as to the right legally to demand tolls from all persons not entitled to exemption, and when tolls were demanded from Mr. Dawes he only claimed exemption as adjutant of the military train, and claimed to be entitled to such exemption under the Mutiny Act, 25 Vict., ch. 25, sec. 72, passed on the 11th of April, 1862.

That enactment provides, that "All her Majesty's officers and soldiers, on duty or on their march, and their horses and baggage, and all recruits marching by route, and all prisoners under military escort, and all enrolled pensioners in uniform when called out for training or in aid of the civil power, and all carriages and horses belonging to her Majesty or employed in her service under the provisions of this act, or in any of her Majesty's colonies, when conveying any such persons aforesaid, or their baggage, or returning from conveying the same, shall be exempted from payment of any duties and tolls on embarking or disembarking from or upon any pier, wharf, quay, or landing-place, or in passing along or over any turnpike or other roads or bridges, otherwise demandable by virtue of any act already passed or hereafter to be passed, or by virtue of any act or ordinance, order or direction of any colonial legislature or other authority in any of her Majesty's colonies; provided that nothing herein contained shall exempt any boats, barges, or other vessels employed in conveying the said persons, horses, baggage, or stores along any canal from payment of tolls in like manner as other boats, barges, and vessels are liable thereto, except when employed in cases of emergency, as hereinbefore enacted."

The provincial statute, Consol. Stats. U. C., ch. 49, entitled "An Act respecting Joint-Stock Companies for the Construction of Roads and other Works in Upper Canada," authorises the formation of companies, not less than five

persons, for the purpose of constructing in, along, or over any public road or highway, or allowance for road, or on, along, or over any other land, a plank, macadamised, or gravelled road, not less than two miles in length, and also any bridges, piers, or wharves connected therewith.

The act provides for the manner in which funds shall be raised, and the mode of proceeding by which any company formed shall become entitled to corporate powers; and the 60th section provides that every road, or other work connected therewith, and all other materials from time to time provided for constructing, maintaining, widening, extending, or repairing the same, and all toll-houses, gates, or other buildings, constructed and acquired by or at the expense of any company acting under that act, and used for their benefit and convenience, shall be vested in such company and their successors.

The 73rd section of that act gives authority to the president and directors of any company, from time to time, to "fix, regulate, and receive the tolls and charges to be paid by persons passing and repassing with horses, carts, carriages, and other vehicles, and for cattle, swine, sheep, or other animals, driven upon, over, and along the road of the company, or by persons passing over any bridge with any such carriages or animals, or using any work constructed, made, or owned by the company."

The 75th section enacts, that tolls may be taken by any company at each time of passing each gate upon the road constructed or owned by the company, and it prescribes the rate of toll which may be taken.

By the 91st section of that act, it is declared that "the following persons shall be exempted from the payment of any duties or tolls, on embarking or disembarking from or upon any pier, wharf, quay, or landing-place, or passing any turnpike roads or bridges, or passing any toll-gate or road made or improved under this or any former act:—

1. Her Majesty's officers and soldiers being in proper staff, or regimental or military uniform, dress or undress, and their horses (but not when passing in any hired or private vehicle).

2. Recruits marching by route.
3. Prisoners under military escort.
4. Enrolled pensioners in uniform, when called out for training or in aid of the civil power.
5. Carriages and horses belonging to her Majesty, or employed in her service, when conveying such persons and their baggage, or returning therefrom.
6. Persons, horses, or carriages going to or returning from a funeral.
7. Any person with horse or carriage going to or returning from his usual place of religious worship on the Lord's day.
8. Any farmer residing on the line of any such road passing any toll-gate opposite to and immediately adjoining his farm when going to or returning from his work on such farm.

The Imperial Act, 25 Vict., ch. 5, sec. 72, exempts all her Majesty's officers and soldiers on duty or on their march, and their horses and baggage, from any toll; but that ground of exemption does not appear to have been the one put forward by Mr. Dawes. Nothing whatever is stated about duty, and, from the evidence, no presumption arises that he was on duty.

The private carriage of Mr. Dawes, under the 91st section of the provincial statute, was not entitled to pass through the toll-gate free from toll. Her Majesty's officers and soldiers in proper regimental or military uniform, dress or undress, and their horses, being expressly excluded from such exemption when passing in any hired or private vehicle.

Nothing being said by Mr. Dawes as to his being on duty, and his private carriage not being exempted from the payment of tolls, either by the Imperial or Provincial Act, the 95th section of the Provincial Act made the wilful passing of a toll-gate, without first paying the legal toll, subject to the forfeiture of a sum of money not exceeding twenty dollars and costs.

The clause is as follows: "If any person not exempted by law from paying toll wilfully passes or attempts to pass

any toll-gate, check-gate, or side-bar lawfully established, without first paying the legal toll, he shall forfeit a sum not exceeding twenty dollars and costs, to be recovered in the same manner as other fines and forfeitures under this act; and in case no sufficient distress can be found to satisfy a warrant issued against the goods and chattels of the offender, such offender shall then be committed to the common gaol of the county for any period not exceeding one month."

The next section authorises a justice of the peace to issue a warrant of commitment in the first instance upon a conviction under the preceding section, without issuing any warrant of distress against goods, if the offender neglects or refuses to pay the amount of fine, and it be made to appear to the satisfaction of the justice that the offender has no goods within his jurisdiction.

There is no complaint against the conviction for any improper exercise of jurisdiction of the magistrate, if Mr. Dawes was not entitled to exemption from tolls. It is not denied that he passed through the toll-gate without paying the toll. He did so no doubt under a belief that he was entitled to claim exemption under the Mutiny Act. That act would relieve him if on duty, but no such ground was urged or claimed before the magistrate. His being in uniform would under the provincial statute entitle him to exemption, if it were not that he was passing and passed in a private vehicle.

The evidence was, that Mr. Dawes in uniform came on the evening of the 21st of June, about a quarter before 8 o'clock, to toll-gate No. 1, on the Blackfriars road, in the township of London, in a private carriage drawn by two horses, and that when toll was demanded he replied that he was in uniform, and he was adjutant of the military train, and therefore exempt from the payment of any tolls.

Mr. A. Kirkpatrick has moved to quash the conviction on various technical grounds: 1st. Because it does not shew who was the complainant in the matter. 2nd. Because there is no offence stated in the said conviction for which the said Dawes could be legally convicted. 3rd. That it does

not appear that toll-gate No. 1 on the Blackfriars road was a lawfully established gate. 4th. Because it appears from the conviction and papers returned into court under the *certiorari* that the said Wentworth Dawes was exempt from paying toll at the said gate No. 1, he being an officer in her Majesty's service in uniform and on duty.

The fact of Mr. Dawes being an officer of her Majesty's service would not entitle him to any exemption from tolls unless on duty, and he did not himself claim exemption on that ground when the charge was preferred against him of having wilfully passed through toll-gate No. 1 without payment of toll. I do not think that Mr. Dawes can now move to quash the conviction on the ground of having been on duty, and on that account exempt from tolls, after allowing a conviction to take place without any notice to the magistrate of that particular ground of exemption. There was no question raised as to the legality of collecting tolls at gate No. 1 on Blackfriars road, and a mere statement or objection that such legality does not appear on the conviction cannot be taken as a valid objection to a conviction for an offence under the 95th section of the Provincial Act.

Being brought up by *certiorari*, we can only quash the conviction for any defects appearing on its face, and I am unable to discover any which could justify us in holding that it is not valid.

The name of the person on whose testimony the proceeding against Mr. Dawes was taken is given in the testimony, and the 108th section of the Provincial Act seems to contemplate just such a proceeding as took place in the case of Mr. Dawes. It is provided by that section that in any proceeding or prosecution before a justice of the peace under that act the justice may summon the party complained against to appear at a time and place to be named in the summons, and if he does not appear, then upon proof of due service of the summons upon such party either personally or by leaving a copy at his usual place of abode, the justice may proceed to hear and determine the case *ex parte*, or to issue his warrant for apprehending and bringing the party

before himself or some other justice of the peace, or he may, if he thinks fit, without previous summons, issue the warrant, and the justice before whom the party appears or is brought shall hear and determine the case.

If it was intended to object to the conviction on the ground of want of evidence, the defendant might have proceeded by appeal to the justices in quarter sessions, but no such objection has at any time be urged; and looking at the testimony as returned to this court, and also at the conviction and the sentence awarded, I think that the rule *nisi* obtained, calling on the Attorney-General and James Owrey, Esquire, to shew cause why the conviction should not be quashed must be discharged.

CONNOR, J., concurred.

HAGARTY, J., having been absent during the argument, owing to indisposition, gave no judgment.

Conviction affirmed. °

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## WINTER V. KEOWN ET AL.

*Conveyance of old road allowance—Ejectment under—Proof of notices before by-law—New road opened while title in the Crown—Surveyor's report—Confirmation of by-law.*

In ejectment for an allowance for road, claiming under a deed from the corporation of the township, the plaintiff proved a by-law, reciting that a public road had been opened through lot 27, in lieu of the original allowance between it and lot 26, and authorising a conveyance of the said allowance to the plaintiff, being the party through whose land such road had been opened.

*Held*, that it was necessary for the plaintiff to prove the notices required by 20 Vict., ch. 69, sec. 8, to authorise the passing of the by-law.

When the new road was opened the patent for lot 27 had issued. Per *McLean*, C. J., the plaintiff not having owned the land when the road was opened through it was not entitled to the old allowance. *Hagarty*, J., expressed no opinion on this point.

The surveyor's report, required by 20 Vict., ch. 69, sec. 5, certified that the road opened answered the purpose of a public highway, not that it was sufficient for the purposes of a public road or highway, as the statute directs. *Semble*, per *McLean*, C. J., not a substantial compliance with the act.

The 20 Vict., ch. 69, requires such a by-law before it can have any effect to be confirmed by the county council within a year from its passing. Before such confirmation the 22 Vict., ch. 99, repealed that act, saving all things done thereunder, and by it no confirmation of such a by-law was made requisite. *Semble*, per *Hagarty*, J., that the confirmation of this by-law was not dispensed with.

EJECTMENT for part of the allowance for road between lots Nos. 26 and 27, in the second concession of the township of Haldimand, commencing at the front of the said concession, and going north to where it strikes the line of the present travelled road between the said lots in the said second concession. Summons issued 14th of August, 1862.

The defendants appeared and defended for the whole of the land sued for. The plaintiff claimed the premises in question by virtue of a deed thereof from the corporation of the township of Haldimand.

The defendants, besides denying the title of the plaintiff, asserted title in themselves as against the plaintiff by virtue of their possession of the said allowance for road.

At the trial, at Cobourg, before *Draper*, C. J., at the close of the plaintiff's case *J. D. Armour*, for the defendants, objected that no by-law had been proved to stop up the road in question under sec. 8 of 20 Vict., ch. 69, and that a stopping up must precede a conveyance.

The township clerk, Thos. Bingley, was allowed to be

recalled as a witness to prove the giving of the notices required by that section before any by-law for stopping up or for the stopping up and sale of any original allowance for road could be passed, but he was not prepared to prove that the notices had been given.

It was further objected that the by-law of the township council for the conveyance of the road to the plaintiff was not confirmed by any by-law of the county council, as required by sec. 2 of 20 Vict., ch. 69: that the new road through lot No. 27 was travelled before the patent was issued, and the act authorising the transfer of an old road allowance to the owner of the adjoining land on which a new road may be established does not apply to such cases: that no report of a road surveyor or deputy provincial surveyor had been shewn as to the sufficiency of the new road: that there was no proof that the new road was legally established, or that no compensation had been paid.

A report of a deputy provincial surveyor was produced, dated the 26th of November, 1857. It was then objected that the report produced did not comply with the statute.

The learned Chief Justice directed the jury to find a verdict for the plaintiff, with leave to the defendants to move to enter a nonsuit or verdict for them.

*J. D. Armour*, during last term, obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside and a nonsuit entered, or a verdict entered for the defendants, on the following grounds: That it was not shewn at the trial that any notice was given of the intended passing of the by-law authorising the conveyance to the plaintiff of the original road allowance for which this action is brought; nor that the said by-law was ever confirmed by the county council of the county in which such original road allowance is situate; nor that any by-law was ever passed for the stopping up of the said original road allowance; nor that the same was ever legally stopped up; nor that any new road had ever been legally opened in lieu of such road allowance; nor that no compensation had been paid for such new road; nor that any report had been made in writing, by

the township or county surveyor, or by a deputy provincial land surveyor, that such new road allowance or travelled road was sufficient for the purposes of a public road or highway: that the new road having been laid out while the land upon which the same was laid out belonged to the Crown, the statute 20 Vict., ch. 69, does not apply; and that the new road having been laid out long before the plaintiff became the owner of the land upon which the same was laid out, the township council had no authority to convey the original road allowance to the plaintiff; and that no action will lie for the said original road allowance under the facts proved.

*C. S. Patterson* shewed cause during the same term, and cited *Choate and the Municipality of Hope*, 16 U. C. R. 424; *Rex v. Sanderson*, 3 O. S. 103; *Fisher v. The Municipal Council of Vaughan*, 10 U. C. R. 492; *Lafferty and The Municipal Council of Wentworth and Halton*, 8 U. C. R. 232.

*J. D. Armour*, contra, cited *Dennis v. Hughes et al.*, 8 U. C. R. 444; *Purdy v. Farley*, 10 U. C. R. 545; *Regina v. Plunkett*, 21 U. C. R. 536.

The facts of the case, and the statutes referred to, appear in the judgment.

McLEAN, C. J.—On the trial a by-law was produced, professing to have been passed by the municipality of the township of Haldimand, (No. 156,) to provide for the conveyance of a certain original road allowance between lots Nos. 26 and 27, in the second concession of the township of Haldimand.

The by-law recites the 5th sec. of the 20 Vict., ch. 69, and that a public road has been opened through lot No. 27, in the second concession of the township of Haldimand, in lieu of the original road allowance between the said lots Nos. 26 and 27, in the second concession of the township of Haldimand, and for which no compensation has been paid, and that the report of C. E. Ewing, road surveyor, that such public road is sufficient for the purpose of a public road or highway, has been made, and this municipality is thereupon

authorised and required to convey the said original road allowance to Matthew Winter, being the party through whose land the said public road has been opened, in lieu of such public road. The by-law provides that the said original road allowance between lots Nos. 26 and 27, in the second concession of the township of Haldimand, be conveyed to the said Matthew Winter, his heirs and assigns for ever, or so much thereof, from the front of the first concession back to the travelled road, and the Reeve of the municipality shall sign, and the seal of the municipality shall be affixed to, and the clerk of the municipality shall sign any such conveyance as may be requisite for conveying the said original road allowance to the said Matthew Winter, his heirs and assigns for ever.

Then follows an extraordinary clause, forming, as it does, a clause in a by-law sanctioning a conveyance to Matthew Winter, and his heirs and assigns for ever, as a compensation for the land taken from him in lieu of the original road allowance between lots 26 and 27, in the second concession of Haldimand: "And be it further enacted that, before the execution of any such deed from this municipality to the said Matthew Winter, the said Matthew Winter do execute a life lease unto Charles Kenny for the allowance above mentioned."

It was admitted on the trial that the patent from the Crown for No. 27, in the second concession of Haldimand, issued in 1854, to Charles Kenny: that he conveyed the south 100 acres of the lot to his son, James H. Kenny, in 1855, and that James H. Kenny conveyed the same part of the lot, on the 17th of September, 1855, to the plaintiff. Charles Kenny, the patentee, died on the 17th of September, 1860, as appears by the testimony of his son. He had lived upon lots 26 and 27 from 1834, or 1835, till within about six years before the trial, probably up to the time of its being conveyed to the plaintiff; but he never had a title till 1854, till which time the title was in the Crown.

Before September, 1854, it is sworn that there was a travelled road across lot No. 27, on which statute labour had been performed. The plaintiff then purchased from

James Kenny in November, 1855, after such road had been established; and it is difficult to imagine, under these circumstances, how the township council of Haldimand could have come to the conclusion expressed in their by-law, that the plaintiff was "the party through whose land the said public road had been opened, in lieu of such public road," between lots Nos. 26 and 27.

The by-law to authorise the conveyance of the old road allowance, and the granting of the deed under it, professes to be made under the 20 Vict., ch. 69; and the 5th section of that act is especially referred to, as authorising the council "upon the report in writing of the township or county surveyor, or of a deputy provincial land surveyor, being made, that such new road allowance or travelled road is sufficient for the purposes of a public road or highway, to convey such original road allowance to the party or parties through whose land or lands the same shall have run, in lieu of such new road." The by-law states that the report in writing of C. E. Ewing, a road surveyor, to the effect required had been made, but the report put in (when the want of such report was objected to at the close of the plaintiff's case) is merely that he, Ewing, had examined the road that had been surveyed and opened as a public highway, "through part of lot No. 27, in the second concession of Haldimand, in lieu of the allowance between the said lot and lot No. 26 in the said concession, and that the said road answers the purpose of a public highway,"—not that the new road allowance or travelled road is sufficient for the purposes of a public road or highway, but that it answers the purpose of a public highway. Without questioning the authority of Mr. Ewing as a road surveyor to give such a certificate, it certainly is not in substance what the act requires, and what the by-law alleges it to contain.

It is evident that the road was made across No. 27 while it was the property of the Crown, and at a time when the plaintiff had no interest whatever in the land; and the allowance of the new road not being taken from his land, he can have no right to the old allowance for road in compensation for land of the Crown taken for the new road.

The case does not seem to have been clearly brought out at the trial ; and as the council had no authority to convey the old allowance for road to any one except to the individual through whose land the new road was run, and not to him if required either for public convenience or to enable the proprietor of the adjoining land to get to his property, we think that the present verdict for the plaintiff cannot be allowed to stand.

The plaintiff on the trial proved no notice of the intended by-law, as required by the 8th section of 20 Vict., ch. 69, under which the council profess to have acted, nor any notice under the 308th section of 22 Vict., ch. 99 ; and as their authority to pass any by-law under either of these acts for selling an original allowance for road depended upon such notice being given, I think that we cannot dispense with due proof, not only that a by-law was passed, but that it was passed with an observance of all the terms on which their power to pass such a by-law depended.

From the testimony on the last trial there is a strong presumption that the plaintiff, so far as the corporation of Haldimand could give it, has received a conveyance, which he was never entitled to as the owner of the land taken for the new road, and then the section of the by-law requiring a life lease to be granted by Winter to Charles Kenny for the same road allowance, before he himself should receive a deed in fee-simple from the corporation, is extremely suspicious.

I think upon the case as it appears that a nonsuit must be entered ; but if the plaintiff prefers to go down to trial again to enable him to produce additional proof, I think a new trial may be had on payment of costs within a month.

HAGARTY, J.—The by-law passed on the 4th of September, 1858, depends on the 20 Vict., ch. 69.

The General Municipal Act, 22 Vict., ch. 99, came into force on the 1st of December, 1858. The conveyance to the plaintiff was made on the 12th of February, 1859, after the latter act became law, repealing the former statute, but saving all things done thereunder.

The former act permits the passing of a by-law for the stopping up and sale of any original allowance, but requires the by-law, before having any force, to be confirmed by the county council within a year from its passing. It also prohibits the passing until certain appointed notices have been given. Section 5 gives the power, "where a public road has been opened, or where a new road shall be opened in lieu of an original road allowance," to convey the original allowance to the party through whose land the new or travelled road shall have run, or shall run, in lieu of the new road.

I do not find this provision for confirming the by-law by the county council within a year in this repealing act; but the conditions on which such by-laws may be passed are somewhat varied, as to the notice being published four instead of three weeks, and as to requiring the council to hear any person affected, in person or by counsel, who desires to be heard. Sec. 308.

It does not appear that this by-law was ever confirmed by the county council.

A grave doubt may arise on this point. The act under which this by-law was passed, authorising the conveyance, was repealed before the conveyance was made. The statute to which the by-law owes its existence, made its confirmation a condition of its having any validity. If that authority be wholly repealed, save as to what has been actually done, I hardly see at present how a by-law requiring a certain act of confirmation within a specified time, can be relieved from the necessity of obtaining this confirmation, because the subsequent act does not require such confirmation for by-laws to be passed according to its provisions.

I agree, however, with the learned Chief Justice in holding that it was necessary to give some evidence of the statutable notices having been given. The Legislature has given a certain power to the municipality, and it seems to me that such power must be strictly executed. We can hardly, I think, apply the "*omnia rite acta præsumuntur*" doctrine to a case like this. It may well be applied to the very different case of a sale of lands by a sheriff. There the

court may presume that all proper notices were given of an intended sale, and that the officer did his duty correctly. Here the power is given to a municipality, to be exercised in certain cases for its own benefit and profit, and seems to me not to be governed by the same principle as the case suggested. The verdict cannot, therefore, be supported.

I wish, however, to guard myself from being understood as necessarily holding that the fact of the fee-simple of the land remaining in the Crown until after the new road had actually been opened and used, would prevent an occupant or locatee of the Crown who afterwards obtained his patent, or the grantee of such patentee, from claiming the benefit of these statutes.

Rule absolute for nonsuit, or for a new trial on payment of costs within a month, at the plaintiff's option.

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### BLEAKLEY V. EASTON.

#### *Common count for interest—Pleading.*

A count for the interest upon and for the forbearance of money due from defendant to plaintiff, and forborne by the plaintiff to defendant at his request, *at the rate of thirty per cent. per annum.*

*Held*, good as a common count, for that the rate stated was wholly unimportant, as would be the price of goods sold if alleged.

DECLARATION, that the defendant, on, &c., was indebted to the plaintiff in the sum of \$4000, for the work and labour, care, diligence, and attendance of the said plaintiff, before that time done, performed, and bestowed in and about the business of and for the defendant at his request. And for goods bargained, sold, and delivered by the plaintiff to the defendant at his request. And for money lent and advanced by the plaintiff to the defendant. And for interest upon and for the forbearance of divers large sums of money before then due and payable from the defendant to the plaintiff, and forborne by the plaintiff to the defendant at his request, *at the rate of thirty per cent.*

*per annum*, for divers long spaces of time then elapsed. And for moneys found to be due from the defendant to the plaintiff upon accounts stated by and between them.

Demurrer to "the sixth count," on the grounds, that no consideration is shewn or alleged for the agreement therein mentioned: that it is not a common count on an executed contract, but sets up a special agreement to pay a certain sum: that it does not shew on what sum it was to be paid, nor how long the forbearance was, nor any agreement to forbear, nor any consideration for a promise to pay interest at the rate of thirty per cent. *per annum* after it had been forborne.

*McMichael*, for the demurrer, cited *Hopkins v. Logan*, 5 M. & W. 241.

*Richards*, Q. C., *Durand* with him, *contra*, cited *Galway v. Rose*, 6 M. & W. 291; *Morse v. James*, 11 M. & W. 831; *McGregor v. Graves*, 3 Ex. 34; *Nordenstrom v. Pitt*, 13 M. & W. 723; *Prickett v. Badger*, 1 C. B. N. S. 296; *Clutterbuck v. Coffin*, 3 M. & G. 847; *Streeter v. Horlock*, 1 Bing. 37; *Girdlestone v. O'Reilly*, 21 U. C. R. 409; *Bullen and Leake Prec.* 28, note (a).

HAGARTY, J.—The sole question in dispute is whether the ordinary count for interest for the forbearance of money is vitiated by the insertion of the words "at the rate of thirty per cent. *per annum*." The argument for the defendant is that as the law, in the absence of any special agreement, only infers a payment at the rate of six per cent., the insertion of a higher rate than that implied by law destroys it as a common count.

I find a difficulty in accepting this view. If the defendant had allowed judgment to go by default, he would not in my opinion have thereby admitted any special rate of interest, and on proof of money due and mere forbearance he could only recover six per cent., and that only on the usual direction to a jury, with whom, in the absence of contract to that effect, the allowance of interest is left as a question of damages.

I feel unable to see how the insertion of a higher or lower rate than six per cent. can any more vitiate a count for interest, than in a common count for goods sold—a horse, for instance—inserting the words “at the price of £50.” In the latter case it is quite unimportant, as far as the evidence is concerned, what amount is stated in the count. In the absence of any fixed price, the law implies a *quantum valebat*, yet on the same count the plaintiff may prove and recover for any price he can shew to have been agreed on. In such a case, I repeat, the insertion of a fixed sum in the count seems to me to be wholly unimportant either as a question of pleading or evidence.

I do not see why it should be otherwise in the case of interest. The plaintiff must prove facts to warrant his recovering interest at all, or at any rate. The law now permits parties to contract at any rate of interest. Money may be forborne at any agreed rate, and I am therefore unable to see any logical distinction between being indebted for interest or money forborne at a named and agreed rate, and being indebted for goods sold at a named and agreed price.

The case cited of Nordenstrom v. Pitt (13 M. & W. 723) shews that the plaintiff may allege in pleading that the defendant is indebted to him for interest on moneys forborne at the defendant's request. The argument against the count was that the law implied no contract to pay interest on mere forbearance of money upon request, and that the cases shew, unless there be a special contract or a usage of trade to that effect, the law will not give interest, to which *Parke, B.*, answers, “The allegation is that the defendant is indebted.”

This seems to me to involve the whole matter. The plaintiff undertakes to shew, and has to shew in evidence, either from contract, usage of trade, &c., that the defendant is indebted to him for interest. As I have already said, I think he neither assists nor injures his case by stating any rate of interest, any more than in the count for goods sold alleging a price fixed between him and the defendant.

I think, on the whole, the plaintiff is entitled to judgment, but I cannot help regretting that this difficulty was so unnecessarily raised by the plaintiff's declaration.

I may add that I cannot understand why the defendant calls that part of the declaration demurred to the sixth count; but as my view is against him on the main point, this does not signify.

MCLEAN, C. J., expressed doubts as to the sufficiency of the declaration, but did not formally dissent.

CONNOR, J., concurred, with HAGARTY, J., remarking that he thought the thirty per cent. clearly surplusage, though he was not prepared to say that if the plaintiff had claimed only four or six per cent. he might not have been held to it.

Judgment for plaintiff on demurrer.

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## THAYER V. STREET AND FULLER.

*Sale of land and goods—Evidence of agency.*

One D. McA., professing to act as agent for defendants, S. & F., on the 13th of January, 1859, bought the plaintiff's farm, mill, tannery, and loose property, for \$5400, of which \$1600 was for the loose property. An inventory of the articles was made out, and signed by the plaintiff, headed, "D. McA. bought of T.," (the plaintiff,) and with a memorandum at the foot, stating that the plaintiff had sold all his right in them to McA. McA. gave to the plaintiff defendants' bond, dated 4th of January, 1859, conditioned to convey to the plaintiff 300 acres of land in Iowa, and his own bond to convey to the plaintiff and his brother 68 acres there to be taken from lands located by defendants and one P. On the same day (13th of January) the plaintiff conveyed to defendant S., alone, 90 acres, and the plaintiff's brother conveyed to him 100 acres, which he said he held for the plaintiff. The plaintiff also conveyed to D. McA. 14½ acres, the tannery property, which in May, 1860, McA. conveyed to S., for a consideration expressed of £5. A witness present at the bargain said that some of the loose property was covered by defendants' bond, the smaller bond by McA. not covering it all, and 62 acres of the 68 was to go to the plaintiff for the part not covered. The witness said that at first the plaintiff refused McA.'s bond, but the latter said he and defendant were in partnership, and added, as the witness believed, that he had part of these lands himself; and then the plaintiff took it. The loose property was left on the farm bought by S. for some 18 months, and a letter was produced, of the 27th June, 1860, from S. to one McC., stating that he did not know what property, if any, J. McA. had bought of his father, which was on the Thayer (plaintiff's) farm, that the property on this farm formerly in possession of D. McA. belonged to defendant, and J. McA. was merely his agent to take care of it.

*Held*, that upon the evidence there was nothing to shew that the chattel property sold nominally to McA. was in fact sold to defendants, or that McA. was authorised to buy it in their name, or to do more than sell for them the 300 acres in Iowa.

*Semble*, that McAlpine's declarations, beyond the scope of his apparent authority, could not bind defendants.

ACTION on common counts.

*Pleas*.—Never indebted, and payment.

At the trial, at the last assizes at St. Thomas, before Connor, Q. C., acting for the Chief Justice of this court, George Thayer, a brother of the plaintiff, proved that in January, 1859, one David McAlpine, professing to act as agent for the defendants, bought the plaintiff's farm, mill, tannery, and loose property. \$5400 was the price for all, \$1600 of this being for the loose property. An inventory was put in, which he said was the list of the articles. It was headed "Malahide, 13th January, 1859, David McAlpine bought of Malachi Thayer;" and at the foot there was the following memorandum: "And immediate possession of the premises purchased by said David McAlpine of me, the said Malachi H. Thayer, the whole of which above-mentioned

articles, and in trusts (a) I have this day received the payment thereof, and these presents witness that all my property and right to the above-mentioned articles have this day been sold to the said David McAlpine.

"In testimony whereof I have hereunto set my hand this 13th day of January, A.D. 1859,

In presence of JOHN McALPINE."

This was signed by the plaintiff.

The witness stated that the sale was to McAlpine alone as agent of the defendants; and that all those things were given up to him, and \$400 worth of lumber besides. A bond was given to the plaintiff made by the defendants. It was produced, dated 4th January, 1859. It was signed and sealed by the defendants, and David McAlpine was the witness, in a penalty of £750, conditioned to convey to the plaintiff by the 1st July, 1860, 300 acres of land in Iowa. The witness said another bond was given by McAlpine, which was produced, dated 13th January, 1859, by which David McAlpine was bound in a penalty of £170 to the plaintiff and Samuel Thayer, conditioned for McAlpine conveying to them by the 1st of July, 1860, 68 acres of land in Iowa, to be taken from land located by the defendants, Fuller and Street, and one Plumb. John McAlpine witnessed this. This witness said the smaller bond did not cover all the loose property: some was covered by the defendants' bond: sixty-two acres was to go to the plaintiff, estimated at \$10 per acre, \$620, for his loose property not covered by the defendants' bond: that the plaintiff refused McAlpine's bond, but the latter said it made no difference, for he and the defendants were partners together: witness believed he said he had a portion of these lands himself; then the plaintiff took his bond.

Then a deed was given on the same day, by which the plaintiff and wife conveyed to the defendant Street (alone) 90 acres of lot 12 in the 3rd concession of Malahide; consideration, \$2500.

Another deed was given by the witness at the same time,

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(a) So in the original. *Quy.* Interests.

he stating he held it for the plaintiff, to the defendant Street for 100 acres; consideration, \$3200.

On the same day another deed was given by the plaintiff and wife to David McAlpine for 14½ acres, part of 19 and 20 in the 3rd concession of Malahide; consideration, \$800. This was the tannery property.

The witness proceeded to say that the plaintiff gave up possession next day. He afterwards went to Iowa: did not get his land; and sued on the bond of Fuller and Street. The witness said he sold his farm to McAlpine for the defendants: the loose property was left on the farm: one Ross was now on it: McAlpine had gone off: McAlpine went on witness' old farm, (the 100 acres,) but left a year ago last winter. Some of the loose property of the plaintiff was brought to the witness' farm and remained there till John McAlpine left. There was a mortgage to one McCausland for \$600, and for \$400 to Walker: they were to be paid. David McAlpine was there for two years or so: his son used the personal property brought to witness' place for some time. The son said he could not sell any of the personal property, as Fuller (the defendant) had made an inventory of it. The land mentioned in McAlpine's bond was never conveyed.

Mr. Walker proved that D. McAlpine came to notify him that the \$400 mortgage would be paid off by Street. It was paid off in March, 1859. McAlpine absconded in 1860: came back twice under Street's subpoena: was not examined. (a) Witness saw him in Lewiston lately: he refused to come as a witness: said both the defendants had been to see him.

A letter from Street was read, dated June 27th, 1860, to J. McCausland, stating that he, defendant, did not know what property, if any, John McAlpine had bought of his father, and which was on his (defendant's) Thayer farm in Malahide: that the property on that farm which was formerly in possession of D. McAlpine belonged to him, (defendant,) and John McAlpine was merely an agent to take care of it for him, the defendant.

A deed was produced by the defendants (on call) dated

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(a) This seems to refer to the suit on defendants' bond.

21st May, 1860, from David McAlpine and wife to the defendant Street, consideration, £5, conveying the same 14½ acres to Street.

This was the plaintiff's case, and a nonsuit was moved, on the ground that no assumpsit was proved: that everything was concluded at the same time the deeds and bonds were given: that the writing shewed the goods to have been sold to McAlpine, and that the plaintiff could not by McAlpine's declaration make him the defendants' agent.

The plaintiff urged that as McAlpine's bond was forfeited and repudiated by the defendants, they were liable if they got the goods and he was their agent.

The learned judge declined to nonsuit, and told the jury that McAlpine having the defendants' bond to give to the plaintiff as part of the transaction was some slight evidence of agency, and that he had authority to buy the chattels for the defendants: that McAlpine's bond being to give lands located by the defendants in Iowa was also some evidence of agency in the purchase; also Street's note to McCausland and the bringing of all the chattels together to George Thayer's farm.

The jury found for the plaintiff, \$706.

In Michaelmas term a rule was obtained by *M. C. Cameron* for a new trial on the law and evidence, and for misdirection, to which

In this term *Adam Crooks* shewed cause, citing *Rodmell v. Eden*, 1 F. & F. 542; *Sug. V. & P.* 98, 236, 237, 675; *Duke of Norfolk v. Worthy*, 1 Camp. 337; *Edden v. Read*, 3 Camp. 338; *Thomson v. Davenport*, 2 Sm. Lea. Cas. 212.

*M. C. Cameron*, contra, cited *Mulholland v. Holcomb*, 6 C. P. 520; *Silliman v. McLean*, 13 U. C. R. 544.

HAGARTY, J.—This case is an illustration of the inconvenience resulting from counsel refusing, as the plaintiff's counsel here did, to consent to leave being reserved to move for a nonsuit, as he was pressed to do by the learned judge who had grave doubts of the sufficiency of the evidence.

The facts proved shewed that McAlpine was undoubtedly

agent for these defendants for the purpose of selling 300 acres of land in Iowa to the plaintiff. He was intrusted with their bond binding them to make such sale, and it may clearly be assumed that he had also their authority to accept from the plaintiff an equivalent for their bond.

Beyond this the direct evidence of agency seems to fail. As to everything, whether land or chattels, covered by the defendants' bond, of course no claim can be made in this action. For the residue of loose property a bond was certainly taken from McAlpine himself, in a penalty, conditioned for his conveying to the plaintiff and his brother, Samuel Thayer, 68 acres in Iowa; and the inventory of chattels is made out as sold to McAlpine, and signed by the plaintiff. The plaintiff at the same time conveys the 14½ acres, called the tannery property, to McAlpine.

To maintain this action there must be legal evidence that the sale of the chattels, though nominally to McAlpine, was in fact direct to defendants. To prove this the plaintiff relies on McAlpine's declarations, and the fact that after McAlpine, father and son, had remained about there for some time, (eighteen months or two years,) that some of the loose property was on the farm bought by the defendant Street, and that the latter in May, 1860, sixteen months after the original transaction, wrote a letter stating that he did not know what property (if any) young McAlpine had bought from his father, and that the property then on the Malahide farm, so bought by Street, formerly in possession of D. McAlpine, belonged to him, Street; with the further fact that in the same month of May, 1860, McAlpine, for a £5 consideration, conveyed the tannery property to Street.

It is perfectly consistent with these facts that Street in due course purchased all the loose property and the tannery from McAlpine, and the difficulty I feel is, how I can point to any single fact which I can say is legal evidence in itself to charge defendants.

As to defendant Fuller, I am at a loss to see how the evidence points in any way to his liability. The plaintiff in this form of action must of course recover against both or neither.

I hold it of the utmost importance to the safety of property and the preservation of legal rights, to hold men to their clear written bargains; and when writings are in evidence shewing beyond question how the parties did in form contract, that it should not be in the power of a man, except on testimony clear beyond reasonable doubt, to decide that the transaction was in fact utterly different from what the writings represent.

It may be that the plaintiff made an improvident bargain, and conveyed valuable land and property for a wholly inadequate consideration, and that the evidence led the jury so to view the case. But with the clear written evidence of the actual bargain before them, they seem to have felt warranted in guessing at what may possibly have been the true facts, and readily setting aside everything contained in the writings.

I confess my perusal of the evidence and documents does not lead my mind to the conclusion arrived at by the jury. The Thayers saw that McAlpine could produce defendants' bond for 300 acres, and they could see no other evidence of his authority to pledge their credit. If, as they now desire us to believe, they considered he had further authority to buy more property and to contract for more land in Iowa, would they not deal with him as acting for defendants? Would they not convey to defendants, and not to him? and would they not in the inventory say they were selling to defendants?

If it were the case, of an agent in fact professing to be a principal and dealing, as such, it would present a very different aspect. But here the agency is declared and admitted. Conveyances are made to the avowed principal, the obligation of the principal is given, and then a dealing commences directly between the Thayers and the agent on his own account and in his own name.

Tracing all or part of the property so sold to McAlpine into Street's possession some eighteen months after the original transaction, can in my judgment in no way warrant our treating the writings as null and void.

It might be a case for a bill of discovery against defen-

dants, to compel them to disclose the true nature of McAlpine's agency and their actual connection with the original bargain, or, under our present system at law, it was open to the plaintiff to put defendants in the witness-box and compel a full statement of the facts.

He has not thought proper to take either of these courses; he has not produced McAlpine. I do not see how it was admissible to prove anything said by McAlpine at Lewiston, beyond the mere fact that he declined to attend.

It may well also be doubted how far anything said by McAlpine beyond the immediate scope of his apparent authority—namely, to give defendants' bond, which he produced, and to take payment or property therefor—can be evidence to prove that when he contracted in writing for property to be conveyed to himself, and gave his own obligation therefor, he was in fact doing all this for defendants.

His saying that he was partner of defendants in the Iowa land (if he said so) can hardly bind defendants. But the witness adds, "I believe he said he had a portion of these Iowa lands for himself, and then the plaintiff took his bond." If he said this it makes most strongly against the plaintiff, shewing that McAlpine professed to own the land himself, that he gave the bond for such land, and that the plaintiff dealt with him accordingly therefor. It is hardly contended that the defendants authorised him to represent that he owned some of their land. If they did not give any such authority, then McAlpine was either truly or falsely representing that he owned the land, and in neither case could be the defendants' agent so to do.

It is worthy of note also that McAlpine's bond is made to the plaintiff and his brother Samuel, and is conditioned to convey the 68 Iowa acres to them. Samuel makes no other appearance in the transaction, and no consideration seems to have moved from him. The only importance of the point may be to further illustrate the separation of the two dealings, that directly with the defendants, and that personally with McAlpine.

I fear we should be establishing a most dangerous precedent, and weakening most materially the proper weight to

be given to clear documents of title, if we hold that there was legal evidence for the jury to do as they have done in this case.

As to the defendant Fuller, there seems to me no more ground for finding him liable for the price of these goods than to fix a liability therefor on a total stranger to the transaction.

I think there should be a new trial without costs.

*Per cur.*—New trial without costs.

### FORTUNE V. COCKBURN.

*Bond to deliver goods seized—Demand—Pleading—Judgment non obstante.*

In an action against one of two obligors on a joint and several bond, reciting that the plaintiff, as sheriff, had seized certain goods under a *fi. fa.* at the suit of G. against C., the other obligor, and S., and conditioned to be void if the obligors should deliver the same to the sheriff, or any person duly authorised, at such time and place as he should appoint, to be sold under said writ or any other writ which the sheriff might then have: *Held*, not necessary to shew a demand on both obligors.

The second plea was, that at the time pointed out for delivery the sheriff had no writ at the suit of G. under which he could have sold said goods. At the trial the only writ produced was one tested 21st May, 1859, and spent. Issue having been taken, and a verdict rendered for defendant on this plea: *Held*, that there must be judgment *non obstante*; for as the bond expressly admitted a levy under this writ, defendant could not object to the plaintiff's right to sell, and the plea therefore formed no defence.

DECLARATION on a money bond by the defendant, and J. M. Campbell, dated 10th August, 1859.

*Pleas.*—1. Setting out the condition of the bond, reciting that the plaintiff had on said day, under a *fi. fa.* at the suit of Gillespie, Moffatt, & Co., against Campbell & Standly, seized certain chattels specified in a schedule annexed; and conditioned to be void if the obligors should deliver said property or cause it to be delivered to the sheriff, or such person as should be authorised to receive the same, and at such place and time as should by such person be pointed out for delivery, to be sold under said writ or any other writ which the sheriff might then have. *Averment*, that Campbell did deliver or cause to be delivered said property to the sheriff, to be sold under said writ, or some other writ which the sheriff then had.

2. That at the time pointed out by the sheriff or person authorised to receive said goods, the sheriff had no writ at the suit of Gillespie, Moffatt, & Co., under which he could have sold said goods.

3. That the defendant broke the condition by the plaintiff's leave and license.

4. That before the plaintiff demanded delivery of said property under the condition, Campbell paid and satisfied the judgment on which Gillespie, Moffatt, & Co.'s writ issued.

The replication joined issue on all the pleas, and assigned as a breach that Campbell and defendant Cockburn did not, nor did either of them deliver the property so levied on by the plaintiff, as sheriff in the defendant's plea and recital of the condition of the bond mentioned, or cause the same to be delivered to the sheriff or person authorised to receive the same, although one Benson, being duly authorised by the plaintiff, on the 12th of February, 1861, demanded of the defendant and required him to deliver said property to him at Benson's Inn, in Grafton, on the 13th of February, 1861, to be sold under said writ in the defendant's plea mentioned.

Defendant took issue on the plaintiff's replication.

At the trial, at Cobourg, before *Draper*, C. J., a verdict was taken for the plaintiff on the first, third, and fourth issues, and damages assessed on the breach at £238, 17s. 2d., and a verdict entered for the defendant on the second issue.

The only part of the evidence necessary to be noticed is that of Benson, the sheriff's officer, who proved a demand of the scheduled property on the defendant, and its non-delivery, and that Campbell had left the country leaving a partner behind him.

The *fi. fa.* was put in, tested 21st May, 1859. He said when he notified the defendant he had the bond with him, but neither the writ nor warrant.

The learned Chief Justice directed a verdict for the defendant on the second issue, reserving leave to the plaintiff to move to enter a verdict for him thereon.

In Michaelmas term last, *C. S. Patterson* obtained a rule to set aside the verdict for the defendant on the second issue on the leave reserved, on the ground that the plaintiff could have sold the goods on the writ produced at the trial had they been delivered when demanded, or for judgment for the plaintiff *non obstante*, the said plea being no bar. He cited *Castle v. Ruttan*, 4 C. P. 252; *McIntyre v. Stata*, 4 C. P. 248.

*Cameron*, Q. C., during the same term shewed cause, contending that the replication was bad, not denying a delivery at Benson's, and that a demand should be shewn on both Campbell and the defendant. He cited *Negelen v. Mitchell*, 7 M. & W. 615; *Crossfield v. Morrison*, 7 C. B. 286; *Doogood v. Rose*, 9 C. B. 132; *Gordon v. Ellis*, 7 M. & Gr. 607; *Plummer v. Lee*, 2 M. & W. 495; *Malloch v. Patterson*, 1 U. C. R. 261; *Roll. Abr.* vol. i. 444; *Shep. Touch.* 136, 139

HAGARTY, J.—The learned Chief Justice notes that he directed a verdict for the defendant on the second issue on being given to understand that this court had decided that a writ of execution under similar circumstances was a spent writ. The cases cited for the defendant merely shew that when there are several pleas on the record, if one of them traverse immaterial matter in the declaration, and the defendant pleads other material matters, which are disposed of on proper issues raised on them, the reasons for a re-pleader cease: that a re-pleader can only be awarded where the court cannot upon the matter alleged see which way judgment ought to be given, and it is never awarded in favour of the party who makes the first default—the latter point being qualified as to its application only when the immaterial issue is found *against* the party making the first default.

I do not think that Mr. Cameron's objection to the replication should prevail. The bond is several as well as joint, and we have to treat the case as we find it on the record. The condition, as the defendant sets it out, is that Campbell and Cockburn (the defendant) should deliver the property, &c., or cause it to be delivered to the sheriff or such person,

&c., at such time and place as should be pointed out by such person, &c. The first plea avers a delivery by Campbell. A delivery by either under the bond would naturally enure to the discharge of both. The replication avers that Campbell and the defendant did not nor did either of them deliver the property, although demand and notice therefor was made on the defendant Cockburn.

No authority is cited to shew that this was insufficient, and I am not prepared to say that on a condition so worded the replication does not establish the liability against a several obligor. The defendant has certainly not delivered or procured a delivery by Campbell and himself, or by either of them, when required so to do.

I do not see anything in the point as to the time and place.

It remains to consider the plaintiff's motion for judgment *non obstante*.

The second plea as it stands is hardly a good answer to the claim. The condition requires the goods to be forthcoming to meet the writ on which they were seized, or any other writ which the sheriff might then have. The plea is that at the time pointed out for delivery the sheriff had no writ of Gillespie, Moffatt, & Co., under which he could have sold.

The learned Chief Justice doubted the defendant's view of the law suggested at *nisi prius*, and I think his doubt well founded.

The only writ produced was the first writ of G., M., & Co., which of course was a spent writ when the goods were demanded.

But there is no contest in this case between different execution creditors. It was clearly pointed out in *Castle v. Ruttan*, (4 C. P. 259,) that there is a marked distinction between the sheriff claiming the goods from those who had given him a bond, and the case of a subsequent execution creditor intervening after the writ on which the first seizure was made had been spent.

*Macaulay*, C. J., says: "If no other writ had intervened, and the goods had been delivered to him" (the sheriff)

“on demand, he might probably have sold them under the writ as again attaching upon them by consent of all parties interested.”

In the bond before us the defendant expressly admits that the sheriff had levied upon these goods on this writ, and the condition is for their re-delivery, “to be sold under the said writ, or any other writ which the sheriff may then have.”

No other writ intervenes, and I do not see how the defendant can be heard objecting that the sheriff had no writ of G., M., & Co., on which he could sell. The levy is admitted by the bond to have been made, and therefore execution of the process had begun. Whatever other parties might be heard to urge against the sheriff's right to continue to act under this writ, I do not see how defendant can object.

I think the rule should be made absolute to enter judgment for the plaintiff on the second issue, *non obstante veredicto*.

*Per cur.*—Rule accordingly.

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#### DARLING ET AL. V. WELLER.

*Attorney—Duty under common retainer—Neglect to re-register judgment.*

*Held*, that under the ordinary retainer to collect a debt, an attorney was not bound to re-register the judgment, which had been obtained by him and put on record; and that the evidence in this case, stated below, shewed no special retainer for that purpose.

*Semble*, that the common retainer imposes no duty to pursue any collateral remedies, such as to register the judgment in the first instance, or to examine the defendant, or to attach debts due to him.

THE declaration alleged a retainer of defendant as attorney, to prosecute an action in the county court against one Vosper, to conduct it to judgment and execution, and to use due care, and to take all proper proceedings upon and concerning such judgment, and the due registration and re-registration thereof in the land registry office, and to procure satisfaction thereof to the plaintiffs: that defendant did obtain judgment, and procured such judgment to be registered; and it thereupon became defendant's duty to use care during the three years then ensuing, that such judgment

should be re-registered according to law, (the statutes being set out,) averring a promise of defendant to use care, and to cause said judgment to be re-registered within three years. *Breach*, omission to re-register within three years, and loss of the security consequent thereon, &c.

*Pleas*.—1st. Not guilty. 2nd. Traverse of any promise to re-register. Issue thereon.

At the trial, at Hamilton, before *Burns*, J., certain admissions were put in. The plaintiffs' judgment was registered on the 4th of February, 1858, and was re-registered in fact on the 9th of February, 1861.

Vosper, the execution defendant, gave evidence as to the position of his property. He proved that he went to the defendant to get him to write to the plaintiffs, asking if they would compound with him at 15s. in the £, to which the defendant replied he could see no object in their so doing, for their judgment was first, and they were safe. He said the defendant appeared to him to be acting all through for the plaintiffs.

The plaintiffs' book-keeper was examined. The plaintiffs lived in Montreal. Defendant, he said, never gave them any information about the re-registry.

Several letters were put in evidence, one of the 8th of January, 1858, from the plaintiffs, enclosing Vosper's acceptance, and requesting defendants "to take proceedings for the recovery of the amount." On the 11th of January, 1858, defendant acknowledged the receipt of this, saying, "It shall receive his best attention." On the 12th of April, 1858, the defendant wrote, "I some time since obtained a judgment against Vosper in your favour; but as there are several claims against him, I cannot state with any certainty what time I shall be able to realize the amount of it."

The judgment appeared to have been registered in the county registry office on the 4th of February, 1858, and re-registered on the 9th of February, 1861.

In a letter dated 21st June, 1860, defendant wrote that he had made the necessary searches on a lot in Haldimand, referred to in a letter of the plaintiffs, of the 11th inst.: that the title seemed to be in Vosper, subject to two mort-

gages: that he had spoken to Vosper on the subject of how much was due, and that the latter promised to give him a statement thereof.

On the 2nd of February, 1861, the plaintiffs wrote from Montreal to defendant, "You will please re-register the judgment against Vosper, and the judgment against the Singletons, as the time will soon expire, we suppose, for doing so. We have not the date of the judgments against these parties, but would feel obliged if you will furnish us with the dates of them." There was a contest of evidence at the trial as to when this letter was received. The three years expired on the 3rd or 4th of February, 1861.

On the 25th of April, 1861, defendant wrote to the plaintiffs, enclosing his account, charging the costs in Vosper's suit, with charges for re-registering the judgment. He said he was very sorry the judgment was not re-registered within the three years, but the plaintiffs' letter did not reach him till some days after, in consequence of irregularities in the trains from snow, and when received the three years had expired: that he supposed, as the plaintiffs had proved their claim in the Chancery suit, *Cockburn v. Vosburgh*, and being the first encumbrancer after the plaintiff, that they had redeemed; probably adding, "Not having any instructions from you, I did not like to interfere, by re-registering your judgment without authority," and asking should he re-register the judgment against Singleton, &c. &c.

At the close of the plaintiffs' case, *Sadleir* moved for a nonsuit, no retainer to re-register being proved. Leave was reserved.

Evidence was called by defendant as to the time of receipt of the letter of the 2nd of February, 1861.

The amount of damages was agreed on, if defendant should be found liable, and a verdict was rendered for the plaintiffs, with leave to the defendant to move the court to enter a nonsuit on the whole of the evidence.

The jury found that the letter was not received till the 5th of February, 1861.

In Michaelmas term, *Burton* obtained a rule *nisi* to

enter a nonsuit, on the ground that the retainer ended with the judgment, and that no new retainer was shewn.

*Richard Martin*, during the same term, shewed cause, and cited *Jenney v. Delesdernier*, 20 Maine Rep. 183; *Lawrence v. Harrison*, Styles, 426; *Levi v. Abbott*, 4 Ex. 588; *Whitehead v. Lord*, 7 Ex. 694; *Bevins v. Hulme*, 15 M. & W. 95.

*Burton*, in support of the rule, cited *Treviban v. Lawrence*, 2 Ld. Raym. 1048; *Parsons v. Gill*, Ib. 896; *Batchelor v. Ellis*, 7 T. R. 337; *Pulling on Attorneys*, 118; *Davis v. Jones*, 5 Dowl. 503; *Macbeath v. Ellis*, 4 Bing. 578; *Searson v. Small*, 5 U. C. R. 259; *National Assurance Association v. Best*, 2 H. & N. 605.

HAGARTY, J.—Mr. Martin pressed his argument to the full extent, that the original retainer to bring the action continues for any length of time, until the attorney notifies his client that it is to be brought to a close, so as to enable the latter to protect his interests by resorting, if he think proper, to other legal assistance.

This is one of the many propositions which may be true in terms, and yet be inapplicable to support the conclusion sought to be arrived at.

I think it quite clear that in the conduct of a cause the retainer continues, as Mr. Martin contends, and as such cases as *Whitehead v. Lord* and several others illustrate. It is also equally clear that, beyond the mere conduct of a cause to its legal termination, an attorney may be retained to conduct any business for the client arising out of the same cause, or any other matter, as to investigating title, drawing deeds, &c., connected with the practice of the law; and he is liable for any loss sustained by his neglect or unreasonable ignorance of the duties of his profession.

But the fallacy seems to me a very plain one, when it is sought to draw as a conclusion from universally admitted principles, that because an attorney is retained to recover a debt by action, that after judgment is obtained, and all ordinary execution process thereon duly restored to, it is still the attorney's duty, on the original retainer, to resort to every

collateral proceeding against real estate to which a judgment creditor may be entitled.

The Legislature allowed a judgment creditor to register his judgment as an encumbrance on the debtor's real estate, in the county where such estate lay. His doing so was an optional proceeding, involving some expense, and created in equity new rights against the debtor.

I am quite unable to understand the argument, that because an attorney is retained to recover a debt, the further liability at once attaches on him of resorting to every statutable remedy which is by law open to judgment creditors, beyond the ordinary execution processes.

The Legislature have also permitted the examination on oath of the judgment debtor, and the attachment of debts due to him by third persons.

I find it impossible to hold that on the original retainer the attorney must resort to one or both, or all these proceedings, or be answerable in damages if it be shewn to the satisfaction of a jury that if such a course had been adopted the plaintiff could have obtained his debt.

It is quite clear that the registering or re-registering of a judgment in a county registry office is a proceeding even more completely collateral to the ordinary conduct of a suit to judgment, and the issue of common execution process, than examination of the debtor, or garnishment of debts due to him. The same remarks may apply to the opposing of a defendant's discharge by an insolvent court, or to proving the claim in an administration suit in the master's office, &c. &c. (See *Drake v. Lewin*, 4 Tyr. 740.)

Nothing seems to my mind more unjust and unsound than a fastening of such an endless set of additional liabilities (wholly extraneous, as they seem to be, to the conduct of the suit) on attorneys merely retained, as this defendant, "to take proceedings for the recovery of the amount" of Vosper's acceptance.

It may not be amiss to note that it has been for some years the practice here to refuse to permit attorneys to endorse in the direction to the sheriff to levy the cost of registering a judgment.

It is of course quite open to a plaintiff to prove a retainer to an attorney to register or re-register a judgment, and it is necessary to see if the case before us presents any proof of such retainer.

After the recovery of judgment, the defendant writes a letter to the plaintiffs, stating that as there were several claims against the debtor, he could not say with any certainty when he should be able to realize the amount. This is a letter that any attorney might write on the original retainer, and gives no evidence to my mind of any proof of a further duty and liability as to collateral proceedings.

More than two years after this he writes again, speaking of having made searches in the registry on a lot of the debtor, alluded to in some letter of the plaintiffs, not produced, telling what the debtor said as to encumbrances and value ; and according to the debtor's evidence at the trial, the latter on one occasion asked the defendant to write to the plaintiffs to induce them to accept a composition for their claim, and the defendant replied he saw no object in their so doing, as their judgment was first, and they were safe.

I do not see on the evidence by whom the judgment was originally registered in February, 1858. I may assume it was done by or through the defendant, whether on special directions from the plaintiffs or not. On this evidence, I see nothing to induce me to find that there was any retainer to do the act the omission of which is complained of.

The letter of the plaintiffs in February, 1861, just as the three years expired, directs the defendant to re-register the judgment, as they thought the time would soon expire. This letter, the jury find, did not reach defendant till the three years had expired.

In reading it I should not draw the conclusion that any duty or obligation to do the act was considered by the writers as existing on the part of defendant. On the contrary, it seems to be just the language a client would use if he desired some new proceeding to be taken, such as filing a bill as judgment creditor to reach some equitable estate, or to have the debtor examined, or to have some debt of his garnished.

It is contended that defendant was bound to go on registering this judgment, whenever the law required that being done to preserve its priority as a charge on land, until he notified the plaintiff of his desire to be relieved from such duty.

I think it most unreasonable to imply the continuance of such a duty for three years, even if I assume that the duty of registering in the first instance existed.

I desire to be understood as not entering into the question, on which some difference of opinion exists in the books, as to the retainer ending with the recovery of judgment.

Assuming the most liberal view of the liability on this point contended for by the plaintiffs, I found my opinion against the maintenance of this action, on the evidence adduced, on the distinct ground that the common retainer to an attorney to collect a debt from a debtor does not require him to resort to the independent and collateral remedy allowed by statute, of registering the judgment in the county land office.

I think the rule to enter a nonsuit must be made absolute.

*Per cur.*—Rule absolute.

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### JUNKIN V. DAVIS ET AL.

*Proof of foreign judgment—Consol. Stats. C., ch. 80, sec. 1.*

In an action on a judgment recovered in the *tenth* judicial district of the state of California, the plaintiff put in evidence an exemplification under a seal, which purported by the impression to be that of the *fourteenth* district, and the certificate of the clerk of the court verifying it was stated to be under the seal of his office, not the seal of the court.

*Held*, affirming the judgment of the Common Pleas in an action on the same judgment, that the proof was insufficient.

ACTION on a foreign judgment recovered in the state of California, before the Honourable William J. Barbour, judge of the District court for the tenth judicial district of that state, held in the county of Nevada. The action, as appeared by the record, was brought against the defendants

after they had left that state, and the proceedings carried on *ex parte*. The judgment was for \$1725, besides \$64.50 damages, and costs of suit taxed at \$256.10. An answer to the plaintiff's demand was filed, and an affidavit of its truth by one of the defendants, sworn in this province before a commissioner in the county of Norfolk, was filed with it, but on motion of the plaintiff's counsel it was ordered that the answer filed in the cause should be struck out. From the affidavits of a Mr. Tweed, an attorney who seemed to have acted for the defendants, it appeared that some understanding was spoken of between him and the plaintiff's attorney, that the answer of the defendants and the affidavit in support of it, though in some respects informal and not in compliance with the law of the state of California, should be received and filed as an answer in the cause; but such understanding or any agreement to that effect being denied by the plaintiff's counsel, the judge ordered the whole to be struck out, and the case went before a jury as undefended, and upon the evidence of the plaintiff a verdict was rendered for a large amount.

An action was brought in the Court of Common Pleas here upon the judgment so obtained, and came to trial at Niagara, before Sir *J. B. Robinson*, the late Chief Justice of this court. A transcript of the judgment was produced in evidence, bearing date 11th July, 1855, certified by J. H. Bostwick, as clerk of the district court, under a seal bearing an impression of "District court, 14th district, Nevada county, California." At the trial it was objected that the seal of the district court for the fourteenth judicial district of the state of California could not be received to prove a judgment alleged to be recovered in the tenth district of that state, our statute relating to the proof of foreign judgments requiring that any transcript to be given in evidence shall be under the seal of the court in which it has been recovered. The objection being renewed in term, the Court of Common Pleas held the evidence of the judgment insufficient, and the plaintiff was nonsuited. The points argued and the judgment of the court from which the Chief Justice dissented will be found fully reported in 6 C. P. 408.

This action was then brought on the same judgment, which was again put in evidence in precisely the same state. The trial took place at Niagara, at the last assizes, before the late Mr. Justice *Burns*, and a verdict was taken for the plaintiff for \$2680·66, including interest, with leave to the defendants' counsel to move for a nonsuit or verdict to be entered for the defendants.

*Richard Miller*, on behalf of the defendants, moved accordingly during the last term, on precisely the same grounds as in the court of Common Pleas in the former suit; and in the same term *Cameron*, Q. C., shewed cause.

McLEAN, C. J.—There is no more evidence than on the first trial that the seal affixed to the certificate verifying the judgment as having been recovered in the tenth judicial district of the state of California is in fact the seal of that court, and the same objections to it are again urged which were considered fatal by the majority of that court. The plaintiff must have been aware, before the second suit was brought, that the insufficiency of the seal and the evidence afforded on the face of the seal itself that it was not the seal of the tenth judicial district, county of Nevada, state of California, were the objections which were urged to the proof of the judgment, and yet no further testimony has been produced on these points. The extracts of the laws of the state of California, shewing the manner in which the judicial districts have on several occasions been changed, even if they were unobjectionable and admissible in evidence, throw no light whatever on the subject of the seal, and only shew that there are fifteen judicial districts or divisions authorised by the laws of the state, and the particular sections of country composing them.

The transcript of the judgment is certified by a clerk of the district court as a "true copy of the complaint, answer, pleadings, papers, minutes, entries, records and proceedings in the cause, as the same appears from and now is of record in my office, fully and fairly transcribed and set forth."

In witness whereof he declares he has thereunto set and

signed his hand, and affixed the seal of his office, the 11th day of July, 1855.

From the certificate and attestation it appears that the seal is in fact the seal of office of the clerk of the district court. It may at the same time be the seal of the court, but it is nowhere stated to be so, and I cannot say that under the first section of ch. 80, of the Consolidated Statutes of Canada, the proof of the judgment is sufficiently established.

I think, therefore, that the rule must be made absolute to enter a nonsuit.

HAGARTY, J., concurred, continuing of the same opinion which he had expressed in the Court of Common Pleas.

Rule absolute.

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#### REGINA V. SHUTTLEWORTH.

##### *Negligent escape—Conviction—Evidence.*

One W. was brought before magistrates in the custody of defendant, a constable, to answer a charge of misdemeanour, and after witnesses had been examined he was verbally remanded until the next day. Being then brought up again, and the examination concluded, the justices decided to take bail and send the case to the assizes. He said he could get bail if he had time to send for them, and the justices verbally remanded him till the following day, telling defendant to bring him up then to be committed or bailed. On that day defendant negligently permitted him to escape, for which he was convicted.

*Held*, that W. was in custody under the original warrant, and the matter still pending before the magistrates, until finally disposed of by commitment to custody or discharge on bail; and that the conviction was proper.

#### CRIMINAL CASE RESERVED.

At the Court of Oyer and Terminer and General Gaol Delivery for the county of Oxford, begun and holden in the town of Woodstock, on Tuesday, the twenty-first day of October, in the year of our Lord one thousand eight hundred and sixty-two, and continued by adjournment until Saturday, the twenty-fifth day of the same month, James Shuttleworth, a constable of the said county, was indicted, tried, and convicted by a jury of his country of a misdemeanour, in permitting one Jesse Williams Woodward, charged with committing a rape on one Ellen Jane Carroll, to escape

from his custody as such constable, after having been committed to his custody to be safely kept for further examination.

From the evidence given at the trial, it appeared that Woodward was on Thursday, the twenty-first day of August, 1862, brought before two of the justices of the peace for the county of Norfolk, under the said charge, on a warrant issued by one of the justices; that an examination of witnesses was had on that day, and Woodward was verbally remanded to the custody of the defendant until the next day, then to be brought before them for further examination.

On the next day, Friday, the twenty-second day of August, the defendant brought Woodward before them, and having finished the examination of the witnesses on that day, the justices concluded to admit Woodward to bail, and to send the matter to the assizes.

The prisoner stated he could procure bail if he had time to send for them, and the justices informed him that they would remand him for a day, and if the bail arrived in the meantime they would take it; and the defendant was verbally directed to bring Woodward before them the next day to be committed or bailed as they thought fit. The next day Woodward escaped from defendant's custody, and was not brought before the justices; he escaped by defendant's negligence.

On the trial the defendant's counsel objected: 1. That Woodward was in the custody of the defendant only for the purpose of enabling him to procure bail, he having been remanded to defendant's custody by the magistrates to enable them either to bail him, if he could procure bail, or commit him if he could not obtain bail: that such remanding being illegal, defendant was not bound to detain Woodward, and he could not therefore be legally convicted of a misdemeanour for his escape.

2. That the allegations in the first count of the indictment are, that the defendant arrested Woodward on the charge of rape, and brought him before the justices, and that they remanded him to defendant's custody for twenty-four hours, and that he escaped whilst defendant had him in custody under such remand: that the evidence shewed that Woodward was really in custody on a second verbal remand, for the purpose of enabling him to procure bail, and therefore he was not in custody as alleged in the indictment; and that there being a variance, he ought to be acquitted. And further, that he was in custody under the second verbal instructions to enable him to procure bail after the justices had

decided to commit him for trial ; that such last instructions were illegal and not justified by the statute, and therefore defendant could not be properly convicted of an escape, as Woodward was not legally in his custody.

It was left to the jury to say, as a matter of fact, if defendant negligently allowed Woodward to escape, and they found him guilty.

In consequence of the objections raised, the court, in the exercise of its discretion under the statute, reserved the question if defendant could be properly convicted, on the objections taken, and on the evidence, for the consideration of the justices of her Majesty's Court of Queen's Bench for Upper Canada, and postponed the judgment on the conviction until such question shall have been considered and decided, which said question is hereby referred to the consideration of the said Court of Queen's Bench.

It was held that the second count of the indictment could not be sustained, and the defendant was bound over to appear at the next sittings of the court of Oyer and Terminer and General Gaol Delivery for the county of Oxford, to receive judgment. The indictment and copy of the evidence at the trial are herewith.

All of which is hereby certified to the Court of Queen's Bench aforesaid, pursuant to the statute in that behalf.

W. B. RICHARDS,

*Presiding Judge at the aforesaid  
sittings of the Court of Oyer  
and Terminer and General  
Gaol Delivery.*

*W. H. Burns*, for the Crown, cited *Burn's Justice*, titles "Arrest" and "Warrant;" *Wright v. Court*, 4 B. & C. 596; *Hale P. C.*, vol. ii. p. 120; *Archbold's Snowden's Magistrates' Assistant*, 4th ed., p. 73.

*D. G. Miller*, for defendant, cited *Consol. Stats. C.*, ch. 102, secs. 25, 40, 43; *Rex v. Fell*, 1 Salk, 272; *Russell on Crimes*, vol. i. p. 423.

HAGARTY, J.—The first count in substance alleges that defendant being a constable, &c., brought one Woodward before the justices, and he was then charged on oath with felony, and the justices duly adjourned the examination, and remanded the prisoner from the 21st of August to the 22nd of August, (being under three days,) and verbally ordered

defendant to keep the prisoner in custody, and have him before them on the 22nd of August, and that the defendant so having him in custody negligently permitted escape.

The second count alleges that Woodward was charged on oath with felony, and a warrant duly delivered to defendant, a constable, to apprehend and bring him before justices; that he arrested and had him in custody, and allowed a negligent escape.

The facts were that being brought up on the 21st of August the justices adjourned to next day, remanding the prisoner. On the 22nd the examination was resumed, and the justices announced that they had resolved to send him to the assizes but would take bail. The prisoner asked for time to send for bail. They agreed to remand him to next day for that purpose, and he escaped, before being brought up next day on the remand.

My very strong impression is, that the defence urged is not open to the defendant, if the facts be sufficiently stated.

It appears to me that the prisoner was in custody on the original warrant till finally disposed of by either commitment for trial or discharge on bail. Till disposed of finally by the justices, I think the custody on the warrant continues. The form of warrant given by our statute is to apprehend and bring before the said justices, &c., "to answer unto the said charge, and to be further dealt with according to law." I therefore do not see why the second count should not support a conviction. We have not to deal with any question as to an illegal remand for a longer period than the statute allows.

Nor can I accede to counsel's argument, that as the evidence was fully taken and the justices had made up their minds to send him to the assizes if he could not obtain bail, an adjournment for a day at the prisoner's instance, and for his accommodation, to enable him to send for bail, rendered the custody illegal, so that the prisoner could lawfully escape by force if necessary; and it may well be doubted if defendant can justify a negligent escape on any such presumed illegality. (See *Rex v. Fell*, 1 *Ld. Raym.* 424.) It would be throwing a needless difficulty in the way of

administering justice so to hold. Till the final decision of commitment to gaol or discharge on bail, I think the matter may fairly be considered as still pending before the justices.

The only difficulty I feel is as to the counts. If I cannot refer to the second count, the first may seem not to meet the facts exactly as they occurred. In that count only one remand is alleged, while two remands or adjournments took place. Unless we may consider the last day's delay simply as a continuance of the custody, as if the constable, instead of a formal remand, kept the prisoner, as it were, all the time before the justices awaiting their decision, which depended on the success or failure of the attempt to procure bail.

The verdict is general, and the only question of fact left to the jury was, whether defendant negligently allowed Woodward to escape, not depending on the particular form of the charge in either of the counts.

That he remains in custody under the original warrant, I refer to Burn's Justice, vol. vi. p. 368: "And when he hath brought him to the justice, yet he is in law still in his custody, till the justice discharge, or bail, or commit him," referring to 2 Hale, 120, where it is said: "When he hath brought him to the justice, yet he is in law still in his custody till either the justice discharge or bail him, or till he be actually committed to the gaol by warrant of the justice."

*Per cur.*—Conviction affirmed.

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MEMORANDA.

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During this term the following gentlemen were called to the bar: JAMES JOHN VANCE, ALEXANDER SHAW, EDWARD MARION CHADWICK, JOHN DONALD McDONALD, SAMUEL BARKER, SAMUEL JAMES BULL, WILLIAM HENRY CORRY KERR, DAVID WILLIAM DUMBLE, CHARLES ARTHUR JONES, JAMES SAURIN McMURRAY, JOHN MAULE MACHAR.

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In Hilary Vacation the HONOURABLE SKEFFINGTON CONNOR, one of the judges of the Court of Queen's Bench, died.

The HONOURABLE ADAM WILSON, her Majesty's Solicitor-General, was appointed a judge of the Court of Queen's Bench, in the room of the late Mr. JUSTICE CONNOR.

The Honourable LEWIS WALLBRIDGE, one of her Majesty's Counsel, was appointed Solicitor-General.

JOHN BELL, JOHN HECTOR, GEORGE W. BURTON, JAMES COCKBURN, ALBERT N. RICHARDS, SAMUEL HENRY STRONG, MATTHEW CROOKS CAMERON, ÆMILIUS IRVING, CHRISTOPHER ROBINSON, and ADAM CROOKS were appointed her Majesty's Counsel.

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EASTER TERM, 26 VICTORIA, 1863.

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*Present :*

The Hon. ARCHIBALD McLEAN, C. J.

„ JOHN HAWKINS HAGARTY, J.

„ ADAM WILSON, J.

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HENRY McCABE v. MARY McCABE.

*Will—Construction.*

“ I, Michael McCabe, of the township of S., south half of lot 24, tenth concession, do make and ordain this my last will and testament in manner and form following: All of my estate, goods and chattels, I give and bequeath to my dear and beloved wife, whom I appoint sole executrix of this my last will and testament, hereby revoking all other and former wills by me at any time heretofore made.”

*Held*, that the word *estate* clearly passed the testator's land, notwithstanding its connection with the personality.

EJECTMENT for lot 10, in the eleventh range east of the Garafraxa road, in the town of Owen Sound, and the south half of lot 24 in the tenth concession of Sydenham.

“ The plaintiff claimed as heir-at-law of one Michael McCabe, the defendant as devisee under his will, which was as follows:—

“ I, Michael McCabe, of the township of Sydenham, south half of lot number 24, tenth concession, county of Grey, Canada West, do make and ordain this my last will and testament in manner and form following: All of my estate, goods and chattels, I give and bequeath to my dear and beloved wife Mary McCabe, whom I nominate, constitute, and appoint sole executrix of this my last will and testament, hereby revoking all other and former wills by me at any time heretofore made.”

At the trial, at Owen Sound, before *Richards*, J., it was objected that this was insufficient to pass land, and the plaintiff also contended that the testator when he made it was of unsound mind.

A verdict having been found for defendant,

*Robert A. Harrison* moved for a new trial, citing *Cliffe v. Gibbons*, 2 Lord Raym. 1325 ; *Buchanan v. Harrison*, 8 Jur. N. S. 965.

HAGARTY, J.—I have read the voluminous evidence at the trial, and am clearly of opinion that the verdict is right on the merits.

It was objected that the will does not pass real estate.

It would in my judgment be a reproach to the law if on such a will a man should be held to have died intestate as to his real estate, including the very lot which he names as his place of abode or residence, as it were.

Notwithstanding the older cases cited, I think the real estate would be held to pass at the present day on words like those before us. The tendency of all the modern cases seems to me to be to look at the plain obvious meaning of words unembarrassed by technicalities which could never have occurred to the mind of the testator. We are asked to say because the word "estate," which by itself is admitted to be quite sufficient to pass realty, is joined to words of mere personalty, that its well-known individual significance is to be destroyed.

I have no doubt whatever but that there are cases in which on the whole context of a will the word "estate" may be restricted to personalty. But this will before us shews to my mind a clear intention to dispose of everything he possessed, land as well as chattels, and I see nothing to restrict the meaning of the word.

I refer to *Streatfield v. Cooper*, 27 Beav. 338 ; *Patterson v. Huddart*, 17 Beav. 210 ; *Coard v. Holderness*, 20 Beav. 147 ; *Fullerton v. Martin*, 17 Jur. 778 ; *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. C. 76 ; *O'Neil v. Carey*, 8 C. P. 342 ; and *Doe Evans v. Evans*, 9 A. & E. 726, from which this case is not distinguishable.

I think there should be no rule.

*Per Cur.*—Rule refused.

## MARY HELEN PHILAN v. THOMAS GRAHAM.

*Will—Construction—Estate in fee or in tail.*

The testator, who died in 1829, devised as follows :—

“To my son John Philan I give and devise all that my real estate situate, lying and being lot number five in the fourth concession of Yarmouth, in the London District, containing 200 acres, be the same more or less,” (the land in question,) “and also I give and bequeath to my said son John all that my real estate situate, lying and being lot number six in the fourth concession of Yarmouth, in the London District, containing 200 acres, be the same more or less, to hold unto him, the said John Philan, his heirs and assigns for ever.”

“In case of the next surviving male heir arriving at the age of twenty-one years,” then he gave to such male heir lot six, “to hold unto the said male heir, his heirs and assigns for ever.” To his daughter E. he gave another lot, “to hold unto her, the said E., her heirs and assigns for ever; and in case that the said E. shall die without children, then the said lot of land shall be equally divided between my surviving heirs.” To another daughter, C., he gave other land, “to hold to the said C., her heirs and assigns for ever.” In case a daughter should be born of his wife, he gave to such daughter other lands, “to hold to the said daughter, her heirs and assigns for ever.” In case his son John Philan should die before coming of age, he gave lot five to his daughter C., “her heirs and assigns for ever,” and lot six to the daughter that should be born of his wife, “her heirs for ever;” and if such daughter should die “previous to her having an heir,” then he gave lot six to his daughter E., “her heirs and assigns for ever.” In the event of the decease of C. “before she shall have an heir,” then he gave lot five to E., “her heirs and assigns for ever.” In the event of the death of C. and of the daughter that should be born of his wife, he gave most of the lands devised to them to E., “and her heirs and assigns for ever.”

After all these devises he added, “It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an encumbrance on the said lots of land, whatever may be considered a fair allowance, according to the interest of the said estate, to be for the support and benefit of the younger heirs.”

Afterwards the testator directed that these lots five and six, which he called “the home lots,” should be leased “until the heir or heirs arrive at age,” and made provision for the event of his wife having a son.

*Held*, 1. That John Philan by the first part of the will took a fee in lot five, the habendum applying to that lot as well as lot six; and

2. That the subsequent general clause was not sufficiently definite or intelligible to cut down such estate to an estate tail.

EJECTMENT for an undivided moiety of 141 acres of land, being part of lot number five, in the fourth concession of the township of Yarmouth.

Both parties claimed title under one William Windham Philan—the plaintiff by descent, the defendant as grantee of John Philan, devisee of the said William Windham Philan.

The case was brought to trial at St. Thomas, before the late Sir *J. B. Robinson*, Chief Justice of this court, in October, 1861, when the seisin of the said William Windham Philan was admitted; and it was also admitted or proved that he died in September, 1829: that he was twice married:

that on the death of his first wife he married Eliza Moore, about the year 1826: that by his first wife he had two children, John and Eliza, (afterwards Mrs. Doyle,) and by the second wife two daughters, one of whom died when only a few weeks old, and the other was the plaintiff: that his second wife died in 1830 or 1832; and that John Philan, the only son, died unmarried in 1847 or 1848, in the twenty-second or twenty-third year of his age.

The deed from John Philan to defendant was dated October 3rd, 1846, and registered on the 7th of October, 1847.

By consent a copy of the will of the said William Windham Philan was put in, bearing date the 9th day of September, 1829, by which the testator gave and devised to his wife, Elizabeth Philan, all that his real estate situate and being the south-easterly half of lot number seventeen, in the ninth concession or tenth range north of the Long Woods Road, containing one hundred acres, more or less, "to hold unto her, the said Elizabeth, her heirs and assigns for ever." The will then proceeded:—

"To my son John Philan I give and devise all that my real estate situate, lying, and being lot number five in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, and also I give and bequeath to my said son John all that my real estate situate, lying, and being lot number six in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to hold unto him, the said John Philan, his heirs and assigns for ever; but in case of the next surviving male heir arriving at the age of twenty-one years, I give and bequeath to such male heir the aforesaid lot number six in the fourth concession of the Township of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to hold unto the said male heir, his heirs and assigns for ever; and if at my death my title to the said last-mentioned lot should be questionable, I in that case desire my executors hereinafter named to take such steps as may be necessary to procure a patent for the same from the directors of the College Company at York, or whoever may be legally authorised to do so."

To his daughter Elizabeth Doyle he gave and devised all that his estate being lot number eleven south of the Lake Road, in the Township of Southwold, in the London District, containing one hundred acres, more or less, "to hold unto her, the said Elizabeth Doyle, her heirs and assigns for ever; and in case that the said Elizabeth Doyle shall die without children, then the said lot of land shall be equally divided between my surviving heirs."

To his daughter Catharine Philan he gave and devised all that his real estate being the north-westerly halves of lots numbers six, seven, and eight, in the seventh concession or eighth range north of the Long Woods Road, in the Township of Carradoc, in the District of London, containing three hundred acres, more or less, "to hold to the said Catharine Philan, her heirs and assigns for ever."

The testator then devised certain lands to a child expected to be born of his wife, Elizabeth Philan, in the following manner: "And in case a daughter shall be begotten by me of the body of my said beloved wife, Elizabeth Philan, I give and devise to such daughter all that my real estate situate, lying, and being the south-easterly halves of lots numbers seven and eight, in the seventh concession or eighth range north-westerly of the Long Woods Road, in the Township of Carradoc, and in the District of London aforesaid, containing two hundred acres, be the same more or less, and also all that my real estate situate, lying, and being the south-easterly half of lot number eighteen, in the ninth concession or tenth range north of the Long Woods Road, containing one hundred acres, be the same more or less, to hold to the said daughter, her heirs and assigns for ever."

Then follow these provisions, relating to the land in question: "In the event of the decease of my beloved son John Philan before he arrives at age, I give and devise all that my real estate situate, lying, and being lot number five in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to my beloved daughter Catharine Philan, her heirs and assigns for ever. Likewise, in the event of the decease of my beloved son John Philan before he arrives at age, I give and devise all that my real estate, situate, lying, and

being lot number six in the fourth concession of Yarmouth, in the London District, containing two hundred acres, be the same more or less, to my daughter that shall be begotten by me of the body of my said beloved wife, Elizabeth Philan, her heirs for ever; and in case my said daughter that may be born should die previous to her having an heir, then and in that case I give and devise the said two hundred acres, being lot number six in the fourth concession of Yarmouth, to my beloved daughter Elizabeth Doyle, her heirs and assigns for ever. Likewise in the event of the decease of my beloved daughter Catharine Philan before she shall have an heir, then and in that case I give and devise the said two hundred acres, being lot number five in the fourth concession of Yarmouth, to my beloved daughter Elizabeth Doyle, her heirs and assigns for ever."

He also devised over to his daughter Elizabeth Doyle, and her heirs and assigns for ever, in the event of the death of the said Catharine Philan and of the daughter to be born of his said wife, the north-westerly halves of lots six, seven, and eight, and the south-easterly halves of lots seven and eight, in the seventh concession or eighth range, also the south-easterly half of lot seventeen in the ninth concession or tenth range, north of the Long Woods Road, containing in the whole six hundred acres, in the township of Carradoc.

Immediately after the several devises already mentioned came the following clause, on which this action chiefly turned: "*It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an encumbrance on the said lots of land, whatever may be considered a fair allowance according to the interest of the said estate, to be for the support and benefit of the younger heirs.*"

He then directed that his farming stock, &c., should be valued by his executors immediately after his decease, and that his son-in-law Lawrence Doyle and the rest of his family should occupy "the home farm" until such time as his debts were liquidated and affairs all arranged, with sufficient security from the said Lawrence Doyle to return the

stock, &c., when his son John Philan should arrive at age; and if the said Lawrence Doyle would not agree to these terms, then the stock should be sold.

He also directed that "the home lots numbers five and six in the fourth concession of Yarmouth" should be leased "until the heir or heirs arrive at age:" that lot eight in the third concession of Yarmouth, and the easterly half of lot thirty-eight south on the Talbot road east, in the township of Southwold, should be leased until sold, giving certain directions as to the mode of cultivation, preservation of trees, &c., on the lots so leased.

Then came several devises of personal property, not material to notice.

In case a son should be begotten by him of his said wife Elizabeth, then he devised to his daughter Catharine Philan the south-easterly halves of lots seven and eight, in the seventh concession or eighth range north-westerly of the Long Woods road, and the south-easterly half of lot eighteen in the ninth concession or tenth range, north of the Long Woods road, and the north-westerly halves of lots six, seven, and eight, in the seventh concession or eighth range, north of the Long Woods road, in the township of Carradoc, containing in all six hundred acres, "to hold to the said Catharine Philan, her heirs and assigns for ever." He added after this devise, "It is my request that if my son-in-law, Lawrence Doyle, shall wish to live in the home farm on the terms hereinbefore mentioned, that my beloved wife Elizabeth Philan shall reside on the said home farm as usual as long as she remains my widow;" and after some intervening bequests of personalty, "it is my request that my son-in-law, Lawrence Doyle, shall occupy both the home farms at such rent as the executors shall consider to be fair." Lawrence Doyle and two others were appointed executors.

The plaintiff relied upon the clause above mentioned relating to all the testator's estate, as cutting down the estate of John Philan in this lot to an estate tail; and contended that in that case the conveyance by the said John Philan to defendant, not having been registered within six months from the execution, could have no operation under the statute to bar the entail—

Consol. Stats. U. C., ch. 83, secs. 4, 31. He contended also, the testator having died before 1834, that the devise to John Philan gave a life estate only in lot number five, for that the *habendum* in fee applied to lot six alone.

The defendant, on the other hand, argued that the *habendum* clearly applied to both lots, five and six; that at all events the word *estate* would carry the fee; and that the general clause relied upon was not sufficiently intelligible to have any definite effect in opposition to this and the several other clear previous devises in fee, or could at most amount only to a trust.

At the trial a verdict was taken for the defendant, and leave reserved to move to enter a verdict for the plaintiff.

Owing to the various changes in the Bench, which will be found stated at 21 U. C. R. 583, and ante, page 282, this case was three times argued: In Hilary Term, 1862, before *Robinson*, C. J., and *Burns*, J.; in Trinity Term, 1862, before *McLean*, C. J., *Burns*, J., and *Hagarty*, J.; and in Hilary Term, 1863, before *McLean*, C. J., and *Connor*, J.

*Adam Crooks* obtained a rule *nisi* to enter a verdict for the plaintiff pursuant to leave reserved. He cited *Doe Ford et al. v. Bell et al.*, 6 U. C. R. 527; *White v. Coram*, 3 Kay & Johns. 653; *Burton v. White*, 7 Ex. 720; *Doe dem. McIntyre v. McIntyre*, 7 U. C. R. 156; *Towns v. Wentworth*, 11 Moo. P. C. C. 526; *Jenkins v. Lord Clinton*, 4 Jur. N. S. 887, S. C. 26 Beav. 108; *Jenkins v. Hughes*, 8 H. L. Cas. 571, S. C. 6 Jur. N. S. 1043; *Marshall v. Grime*, 28 Beav. 375; *Earl of Tyrone v. Marquis of Waterford*, 6 Jur. N. S. 567, S. C. 1 De G. F. & J. 613; *Lucas v. Goldsmid*, 7 Jur. N. S. 719; *Jordan v. Adams*, 7 Jur. N. S. 973; *Greenwood v. Verdon*, 1 Kay & Johns. 74; *Woodhouse v. Herrick*, Ib. 352.

*Christopher Robinson* shewed cause, and cited *Jarm. on Wills*, 2nd ed. vol. ii. pp. 225, 227; 3rd ed. vol. ii. pp. 255, 467; *Biddulph v. Lees*, 28 L. J. Q. B. 215; *Towns v. Wentworth*, 31 L. T. Rep. 274; *Jervoise v. The Duke of Northumberland*, 1 Jac. & W. 559, 574, 575; *Powell on Devises*, 3rd ed. vol. ii. p. 451.

testator intended by the will to devise to his son John what he calls the home farm, consisting of lots five and six in the fourth concession of Yarmouth, and that the words of inheritance which follow the devise of number six apply to both lots. It cannot be supposed that the testator intended to give an estate in fee in the latter lot and only an estate tail in the other lot, especially as all the other devises to his several children are to them and their heirs and assigns for ever.

The words, "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever," do not of themselves create an estate tail or change the nature of the estate previously devised in fee. They seem rather to convey a wish on the part of the testator that the several devisees should entail the properties devised to them respectively, so that the individual who would have been heir-at-law if the law of inheritance had not been changed would have the whole property. The subsequent part of that clause of the will shews a desire on the part of the testator to impose a charge on the several lots for the support and benefit of younger children, so that, while the heir-at-law was to be the sole owner of the lands, the younger children should also derive some measure of support from them; but the clause is in all respects so ambiguous that it must be inoperative, and the plain words of the several devises cannot be affected by it.

The devise to John Philan, to hold to him and his heirs and assigns for ever, created an estate in fee-simple with the usual power of alienation in the devisee, and I am unable to see anything in the will which must be taken to qualify that devise and reduce the estate to an estate tail. Some of the property is devised in fee to a child not born at the time the will was made; and lot number six, one of the lots devised to John Philan, is devised over to that child in the event of John Philan dying before he became of age. It seems impossible to suppose that the testator could have intended, in the event of that lot becoming the property of that child, to create an encumbrance on the lot "for the support and benefit of the younger heirs," as expressed in the clause of the will referred to.

Under the circumstances I am unable to come to any other conclusion than that John Philan took under the will

an estate in fee in the lot in dispute, and that his conveyance to the defendant must be held valid, and the plaintiff's rule must be discharged.

HAGARTY, J.—The first devise of lot five (with the other lot number six) to John Philan, is in my judgment a devise of the fee-simple. I think the *habendum* to him, his heirs and assigns applies to both lots.

The next mention of this lot is in a subsequent part of the will, which declares that in the event of John's death before he arrives at age, then lot five is devised to the testator's daughter Catharine, her heirs and assigns for ever.

In a subsequent clause, if Catharine die before she shall have an heir, then he devises lot five to his daughter Elizabeth, her heirs and assigns for ever.

He afterwards directs that lots five and six be leased until the heir or heirs arrive at age.

On these devises we would have lot five to John in fee, defeasible on his death under age, then over in fee to his sister Catharine; and if she die before she shall have an heir, which I suppose we are to read heir of her body or direct heir, then over to her sister Elizabeth in fee.

This is clear enough; and as John did not die under age, his estate in fee became indefeasible.

Then comes the very singular clause, worded as follows: "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an encumbrance on the said lots of land, whatever may be considered a fair allowance according to the interest of the said estate, to be for the support and benefit of the younger heirs."

It is not easy to discern with reasonable certainty what was the testator's meaning in this clause. If the testator meant to cut down (for instance) John's estate in fee in lot five to either an estate tail or a mere life estate, so as to ensure it passing to his son or children generally, I am surprised at not finding a direction that the lots should not be *sold*, as well as not divided. In such an inartificially drawn clause I would naturally expect this, a most common direc-

tion from testators drawing their own wills and endeavouring to keep land in the family. Its absence is not without significance. I do not think the testator clearly understood the meaning of the words, "entailed to their heirs and successors for ever," followed, as they are, by the directions as to the heir-at-law and the proposed encumbrance.

If John be made tenant in tail, and died under age, but leaving issue, such issue should in ordinary cases take in tail. But the will expressly gives the estate over in such case to Catharine in fee; so with her, if she die before having issue, then it is given over to Elizabeth in fee.

Nothing can be more explicit than the devise absolutely in the earlier parts of the will to the devisee's heirs and assigns for ever.

Who are the "younger heirs" in whose favour he creates the proposed encumbrance? Is it to be read as a perpetual charge for the heir-apparent in tail, to attach on all existing tenancies in tail? Who is to determine the amount and apportion the encumbrance? Or does the testator contemplate a future settlement of his estate, arranging all these matters?

If Lord *Eldon* felt the difficulty so great in the far simpler and more intelligible devise in *Jervoise v. The Duke of Northumberland*, (1 Jac. & W. 559,) that he would not force the estate on an objecting purchaser, he would, I think, have felt the difficulty increased tenfold if this case were before him. There the words were, "To my son R. I leave all my estates at, &c., to be entailed upon his male heirs, and failing such to pass to his next brother, and so on from brother to brother, allowing £2500 to be raised upon the estates for female children each."

Mr. Jarman says, 2nd ed. vol. ii. 292, that Sir T. Plumer, in a suit to ascertain rights of parties, held that R. took an estate tail; that on R.'s marriage the estate was afterwards settled, and under a power of sale in the settlement the Duke purchased; and that it was on his objecting to the title that Lord *Eldon's* decision was given.

In Sugden's V. & P., 14th ed. 390, note, after noticing *Jervoise v. Duke of Northumberland*, it is said that in a family suit R. was held to take an estate tail.

Here we have to deal with a clause hardly possible of being carried into effect without an equity suit, and following express devises in fee of the lands.

I think it highly probable that the testator in this confused expression of desire, did not wish to alter his previous express devises: that the heirs and successors that he mentions so loosely may be the named "heirs" and objects of his bounty specially provided. For instance, Catharine, as an heir, if John died under age; Elizabeth, as an heir, if Catharine died before she should have "an heir;" and in the many cases in which somewhat similar words are used respecting his other lands.—"None of the lots to be divided, but to be the sole property of the heir-at-law:" in this he possibly means "the heir I have designated;" his object is to prevent division, but, as I have already remarked, not apparently to prevent a sale.

When his will was made a tenant in tail could not alien in fee, and fines and recoveries were practically unknown in Canada. It may naturally be remarked that he may be assumed to know that a tenant in tail could not cut off the entail by sale; but his frequent previous use of the words "heirs and assigns for ever" rather induces me to think that he contemplated, as in John's case, an absolute estate in fee, if he survived the age of twenty-one years.

If the clause as to entailing had been devising the land "to my son John, to be entailed to his heirs and successors for ever," &c. &c., to the end of the clause, then we might venture perhaps, considering the comments on *Jervoise v. The Duke of Northumberland*, to hold that John was seised in fee tail, though Lord *Eldon's* doubts would press very hard. But we have here to deal with the whole will, and on the whole I feel very great difficulty in ascertaining the testator's meaning.

Feeling, however, the impossibility of giving an intelligible effect to this extraordinary clause, I prefer on the whole to let the previous clear words of devise prevail, and not to cut down the estate thereby given by the loose and confused expressions adopted by the testator.

I repeat that with much hesitation I arrive at the conclusion that John Philan, having attained full age, the estate

in fee devised to him became indefeasible, and that he had the right to alien in fee.

I may add that the late Mr. Justice *Burns*, before whom the case was argued, had formed a strong opinion concurring in the decision now given. The late Sir *John Robinson*, who also heard the first argument, had considered the case, but had not arrived at a conclusion, and we have therefore not the advantage of his opinion.

Rule discharged.

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### CAMERON V. TODD.

*Action for rent by assignee of reversion—Mortgage—Estoppel—Liability of mortgagee of the term.*

S. having mortgaged certain land in fee afterwards leased it for twenty-one years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree in Chancery the land was sold, expressly subject to the lease, to J., who received a conveyance from S. and P. and the plaintiff, each using apt words ("bargain, sell, and release") to convey a legal estate in fee. On the same day J. mortgaged to the plaintiff to secure a balance of the purchase money. This mortgage had been discharged before action by certificate duly registered; and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage.

*Held*, 1. That defendant, as assignee of the term by way of mortgage, was liable on the covenant for rent, though he had never entered. 2. That though S. when he leased had only an equity of redemption, yet as this fact did not appear in the lease he had a legal reversion by estoppel as against the tenant; and that such reversion passed to the plaintiff by the first conveyance from S., (which contained apt words to pass the legal estate,) though in it the mortgage was recited. 3. That the subsequent sale and conveyance being expressly subject to the lease, the reversion was not merged in the legal estate then derived by the plaintiff through P. and J.; and that the plaintiff being still bound by the lease, defendant was so as well. 4. That the plaintiff's discharge of the mortgage did not destroy his right of action for rent previously accrued:

And that he was therefore entitled to recover.

THIS was an action brought by the plaintiff as assignee of the reversion against defendant as assignee of the term, to recover the same arrears of rent sued for in the case of *Jones v. Todd*, reported ante, page 37.

It will be seen that the court there, in granting a new trial, expressed doubts whether this plaintiff was not the proper party to sue, not the then plaintiff *Jones*, and this action was in consequence brought in his name.

The declaration in this case was the same as in that,

except that after averring the grant of the reversion by Robert Stanton, the lessor, to Jones, it was alleged that Jones during the term granted to the plaintiff.

The pleas were—1. Denying the execution of the lease by Stanton and March. 2. Traverse of the grant of the reversion by Stanton to Jones, and by Jones to the plaintiff. 3. That before making the lease Stanton on the 1st of June, 1830, mortgaged the fee-simple to one Carfrae for £600, and such legal estate at the time of executing the demise was outstanding in Carfrae's devisees; and Stanton when he leased had only an equity of redemption, and was not seised of fee, as alleged: that the devisees, by indenture of the 4th of May, 1849, granted and assigned the fee-simple and the mortgage money to one Patterson, by whom the equity of redemption was duly foreclosed in Chancery; by means whereof it was alleged that Stanton ceased to have any interest in the lands, and the reversion alleged to be reserved to him upon the term granted to March became merged and extinguished in the legal estate and inheritance of Patterson, so that such alleged reversion did not vest in the plaintiff as alleged.

Pleas 4, 5, 6, 7, and 8, the same in effect as pleas 2, 3, 4, and 5 in the former suit.

It is unnecessary to repeat the facts here, as they were the same as in that case, and are there fully stated.

At the trial, at Toronto, before *Richards, J.*, a verdict was taken for the plaintiff for £721, 12s., subject to the opinion of the court.

In addition to the authorities referred to in the previous case,

*Cameron, Q. C.*, and *Anderson*, for the plaintiff, cited *Bickford v. Parson*, 5 C. B. 920; *Platt on Covenants*, 538; *Cru. Dig.* vol. vi. p. 492.

*Galt, Q. C.*, and *Adam Crooks*, contra, cited *Doe dem Viscount Downe v. Thompson*, 9 Q. B. 1037; *Pargeter v. Harris*, 7 Q. B. 708; *Harrold v. Whitaker*, 11 Q. B. 147, 163; *Whitton v. Peacock*, 2 Bing. N. C. 411; *Wootton v. Steffenoni*, 12 M. & W. 129; *In re Williams' Estate*, 5 De G.

& Sm. 515; Burton R. P. 428; Coote on Mortgages, 336; Spencer's case, Sm. Lea. Cas., ed. of 1862, 43, 76; Moss v. Gallimore, Ib. 553.

McLEAN, C. J.—This action is brought by the plaintiff, as assignee of the reversion, against the defendant as assignee of a term created by a lease from Robert Stanton, as owner in fee of the demised premises, to Charles March, which lease has been assigned to the defendant.

The lease bears date the 29th of February, 1844, and is made by Robert Stanton, in consideration of the yearly rent therein reserved, and of the covenants therein contained on the part of the said Charles March, his executors, administrators, and assigns, to be respectively paid, observed, and performed, to have and to hold the said piece or parcel of ground and premises thereby demised, with the appurtenances, unto the said Charles March, his executors, administrators, and assigns, for and during the term of twenty-one years, to be computed from the first day of March, 1844, and then fully to be complete and ended; yielding and paying during the said term unto the said Robert Stanton, his heirs and assigns, the clear yearly rent of £100, by four quarterly payments on the first day of March, the first day of June, the first day of September, and the first day of December, in each and every year. The lessee covenants to pay or cause to be paid the said yearly rent by four equal quarterly payments on the days before mentioned for the payment thereof; and the lessor covenants that the lessee, Charles March, his executors, administrators, and assigns, paying the said yearly rent, and performing the covenants therein contained, shall and may quietly and peaceably have, hold, occupy, and enjoy the said piece or parcel of ground, without the lawful let, suit, interruption, or disturbance of the said Robert Stanton, his heirs or assigns, for and during the said term.

Under that lease the tenant, March, and all persons claiming under him or through him, are estopped from denying the title of the lessor, and under the statute 32 Hen. VIII., ch. 34, are liable to pay the rent and to perform the coven-

ants contained in the lease so long as they hold the demised premises under that lease. The lessor has assigned his reversion to Edward C. Jones, and all persons claiming any interest or estate therein have joined in the conveyance, using apt words to pass a reversion in fee. After Stanton's conveyance to the plaintiff, March, the tenant, would be estopped from denying the title of his-lessor or his assignee, and so a legal reversion in fee by estoppel would entitle the plaintiff as assignee to enforce the terms and enjoy all the benefits of the lease. By the decree in Chancery all parties interested joined in conveying the premises in fee to Edward C. Jones, and it appears to me that the reversion by estoppel must necessarily have passed to him under that deed.

On the same day that that deed was made to Edward C. Jones, 27th July, 1853, he executed a mortgage in fee to the plaintiff to secure payment of the sum of £637, 2s., to be paid on or before the first day of March, 1865, with interest thereon half yearly, on the first days of January and July in each year, until the principal money and interest should be fully paid and satisfied. The plaintiff had the legal estate under this mortgage from its date till the payment of the mortgage money and interest, during which period the rent sued for accrued on March's lease, and was payable to the plaintiff as the holder of the reversion.

When the mortgage money was paid the plaintiff executed the usual certificate of payment required by the Registry Act, Consol. Stats. U. C., ch. 89, the 59th section of which provides that such certificate shall, when registered, be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs and assigns, of his original estate; and if given *after* the expiration of the period within which the mortgagor had a right in law to perform the condition, shall have the effect of defeating any title remaining vested in the mortgagee or his heirs, executors, administrators, or assigns, but shall not have the effect of defeating any other title whatsoever.

It is contended that since the registry of the certificate of payment of mortgage money the plaintiff's reversionary interest has wholly ceased, and that the premises have be-

come vested in the mortgagor as if the mortgage had never been made. It may be admitted that since the registry of the certificate the estate has become vested in the mortgagor precisely as it was before the mortgage was given; but while he held the reversion a right of action had vested in him for rents accruing due while seised of such reversion, and that right is not affected by any assignment made after the period when it became due.

In Platt on Covenants, page 538, cited by Mr. Cameron in the argument, it is said, "A right of action once vested and attached in the grantor for a breach in his own time will not be defeated by his assignment over; . . . for the contract, which was transferred by the statute, still remains as to that breach, though the privity of estate is gone." Then in Comyn's Landlord and Tenant, p. 268, it is even more clearly laid down, that "if a breach happen in the time of the grantee, and then he assign the reversion over, he may bring covenant against the lessee for the breach so happening in his time, notwithstanding he has parted with his estate."

I do not think that the mortgagee in this case by the assignment or surrender of his reversionary interest divested himself of a right of action which was vested in him before such surrender. If that were the case, then the holders of the term would be entitled, notwithstanding the breach of covenant, to set the reversioner at defiance, and might claim exemption from the payment of any rent for the period during which the plaintiff held the reversion.

The facts of this case are the same in all respects as in the case of *Jones v. Todd*, (ante, page 37,) and are so fully stated in the report of that case that I have not thought it necessary to state them more fully. After full consideration of the circumstances I have arrived at the conclusion that the verdict for the plaintiff cannot be disturbed, and that the rule *nisi* must be discharged.

HAGARTY, J.—The facts of this case appear so fully in the report of *Jones v. Todd*, (ante, page 37,) that I do not deem it necessary to make any detailed statement of the various conveyances in evidence.

In *Jones v. Todd* the court in granting a new trial suggested the existence of grave difficulties in the way of the then plaintiff, Jones, recovering for arrears of rent accrued while the reversion was in Cameron as mortgagee. The present suit is brought in the name of the latter.

I would first notice the question of defendant's liability as a mortgagee of the term to covenants running with the land, assuming that he never actually entered.

*Williams v. Bosanquet*, (1 B. & B. 238,) decided in error by ten judges, who were unanimous in their view, seems to settle the law, unless it has been since overruled. It is an elaborate review of conflicting authorities, and seems fairly to meet all the difficulties suggested, and decides that a mortgagee of the entire interest in the term is liable without entry.

In Coote on Mortgages, edition of 1850, page 121, it is said: "It is therefore now clear, both on principle and sound authority, that if a mortgagee accept an assignment of all the remaining interest in the term, he will be liable to the payment of the rent and performance of the covenants in the original lease, so long as he shall be the legal owner of the lease, although he shall not take actual possession of the premises."

Since 1850 I have not found this view of the law questioned.

I now turn to another branch of the case. Stanton, the original lessor, when he demised to March had only an equity of redemption, and no legal reversion. As the true state of his title does not appear in the lease, I consider it clear that there is a reversion by estoppel, and that this reversion would for the purposes of this suit vest in his assignee, Cameron.

I at first apprehended a serious difficulty from the fact that in this transfer of the reversion it is recited that a mortgage in fee had been made to Carfrae. But the very carefully considered judgment of the Court of Exchequer in *Cuthbertson v. Irving*, subsequently confirmed in error, (4 H. & N. 742, 6 H. & N. 135,) has removed that difficulty

from my mind. There the lease did not shew any want of title, the assignment did shew it.

*Martin*, B., who delivered the judgment of the court, says, (4 H. & N. 754,) "Upon consideration, we think the authorities shew that the defendant is estopped from disputing that the lessor was seised of an estate in reversion; and, as there are apt words in the assignment to convey a legal estate in fee in reversion to the plaintiff, the estoppel continues in his favour, notwithstanding the assignment to him shews the want of title. The estate in reversion by estoppel was created before the assignment was executed, and in our opinion was not destroyed by it. It would have been otherwise if the want of title had appeared on the face of the lease itself; in that case, the true facts being there disclosed, there would be no estoppel at all."

Again, "Where a lessor by deed grants a lease without title and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest and not by estoppel; and an action will lie by the assignee of the reversion against the tenant on the covenants in the lease." This latter sentence may be referred to on another branch of the case.

In the assignment by Stanton to Cameron there are certainly "apt words to convey a legal estate in fee in reversion," although the outstanding mortgage in fee to Carfrae is mentioned. The conveyance is by lease and release, and recites that Stanton is seised in fee-simple, and the usual words to convey a reversion in fee are used, with *habendum* to the assignee and his heirs.

But the point chiefly laboured by the defendant arises on the following facts: Patterson, assignee under Carfrae of the legal estate, filed his bill to foreclose the mortgage, and a sale was ordered. The conditions of sale under the decree provided that the sale was to be subject to the lease granted by Stanton to March for twenty-one years, at £100 per year.

At the sale Magrath was the purchaser for £1420. Magrath then transferred all his right to Jones, and by agreement between all the parties a deed was made on the 27th of July, 1853, between Patterson, Cameron, Stanton,

(and his children,) Magrath, and Jones. The Carfrae mortgage is recited, its assignment to Patterson, and that Stanton has conveyed all his estate and interest in the premises, subject to the mortgage, to Cameron and his heirs, on certain trusts.

It recites the decree in Chancery, in the suit in which Stanton, Cameron, and the younger Stantons were defendants, the reference to the master, the decree, the report, the conditions above noticed, and the sale to Magrath and transfer by the latter to Jones; that Jones, instead of paying the money, paid to Patterson the mortgage money and costs, and the balance, £637, was to be secured by mortgage to Cameron as trustee, on the same trusts as in Stanton's deed to him. Then, in pursuance and performance of the decree, &c., Patterson according to his estate and interest as mortgagee, and at the request of Magrath, bargains, sells, and releases to Jones and his heirs and assigns; Cameron, Stanton, and the *cestuis que trust*, the younger Stantons, all convey to Jones in fee, with reversions, remainders, estates, and equities of redemption of the granting parties, *habendum* to Jones, his heirs and assigns, "subject to the said indenture of lease granted by the said Robert Stanton to the said Charles March" (a).

On the same day the mortgage is executed from Jones to Cameron, reciting the former conveyance in trust by Stanton, the Chancery suit of Patterson, the decree and sale, and then containing a conveyance in fee, with a defeazance on payment of £637 and interest at specified times. There is indorsed a registrar's certificate of discharge of this mortgage as of the 2nd of September, 1861, prior to the commencement of this suit.

The defendant argues that on this state of facts whatever reversion the plaintiff may have acquired from Stanton is merged, as it were, or lost by its union with the legal estate derived through Patterson and Carfrae; and that the deed executed by all the parties after the Chancery sale sets forth the whole facts, and leaves the whole matter at large, and puts an end to the estoppel.

This is a very serious proposition, amounting as it does

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(a) See the contents of this deed further noticed, post, page 400.

simply to this—that after a lease has been granted by one who has only an equitable estate, and on which as between him and the lessee there is clearly a legal reversion by estoppel, and afterwards such proceedings are had that a deed is executed by all parties interested both in the legal and equitable estates, by which a clear title in the premises is conveyed to a third person, expressly saving the term created by the lease, and declaring that the estate conveyed was to be expressly subject to the lease, describing its nature and effect, it still lies in the power of the tenant and those claiming through him to insist that the term is gone, and his covenants at an end.

I think we should require the most unmistakable authority binding upon us before we should be asked to accede to such a result, so unjust in its nature, and so completely opposed to the express declarations of all the parties interested as owners in the property.

The authority relied on is *Doe ex dem. Lord Downe v. Thompson*, (9 Q. B. 1037,) decided by Lord *Denman* in 1847. The facts were these:—

Burton seised in fee mortgaged to Bromet to secure £1000. After this he leased to defendant Thompson for thirty-one years. In the same year £900 was paid on the mortgage. In 1828 Burton became bankrupt. In 1834 Messrs. Swann paid Bromet £100, and took from him a deed in fee. Three months after Burton's assignees sold the premises to Lord Downe for £245, £100 of which was paid to the Swanns, and they by the assignees' directions conveyed to Lord Downe in fee, the assignees being parties and joining in the conveyance. The deed recited the conveyances to Bromet and the Swanns, the bankruptcy and assignment, describing the premises as formerly in the tenure and occupation of Burton, but now of Thompson, his under-tenants or assigns, but did not refer to the lease. Messrs. Swann bargained, sold, and released; the assignees released, ratified, and confirmed.

Lord Downe, after receiving rent for two years, gave notice to quit and brought ejectment, insisting that the term was at an end.

Lord *Denman*, in a very short judgment of a few lines, says: "The lease was good against Burton by estoppel only. He had not the legal estate when he granted it, nor did he acquire it afterwards; nothing passed to his assignees but the equity of redemption, and they could pass nothing else to Lord Downe. The legal interest had passed to Lord Downe wholly and entirely from Messrs. Swann, who were not privies to nor in any way estopped by the lease; neither can Lord Downe be estopped in respect of the interest which he took from them. Doubtless, if Lord Downe had taken the legal interest from Burton, he would have been estopped in the same manner that Burton would. . . . But as he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them; and as those from whom he did take were not estopped, neither is he. We think that the fact of the assignees joining in the conveyance cannot place him in a different situation from that in which he would have stood had the Messrs. Swann alone conveyed."

It was much pressed upon the court that on the face of the deed to Lord Downe the assignees appeared to have no legal interest, and the lease to defendant was not mentioned; also that the deed would shew that Burton (or his assignees rather) had conveyed no legal title, and that there is no estoppel by a deed shewing the true facts.

I must say, with great submission, that this very brief judgment of Lord *Denman* is anything but satisfactory to my mind; and reading it by the light of the subsequent explanation of the law of estoppel between landlord and tenant in *Cuthbertson v. Irving*, I cannot regard it as supporting the defendant's view to the extent claimed.

The facts, moreover, are very different from those before us. The assignees of Burton there apparently did not use (in *Martin*, B.'s language) "apt words to convey a legal estate in fee in reversion;" they merely "release, ratify, and confirm," while the Messrs. Swann, who have the legal estate, "bargain and sell," &c. Lord *Denman* says, "Doubtless if Lord Downe had taken the legal interest from Burton he would have been estopped in the same manner

that Burton would, as was held in *Trevivan v. Lawrance*, 1 Salk. 276." I presume his lordship means, had he taken a deed professing to assign to him Burton's legal estate in fee in reversion, with apt words, &c., he would be estopped. He cannot have meant if Burton really had conveyed the fee, because the whole case is based upon the fact that Burton had not the fee to convey. If read in this way the judgment may be reconciled with the other cases, and it is probable he so meant it, as the case in *Salkeld* to which he refers says, "If a man makes a lease by indenture of D., in which he hath nothing, and after purchase D. in fee, and after bargains and sells it to A. and his heirs, A. shall be bound by this estoppel; and where an estoppel works on the interest of the land, it runs with the land into whose hands soever the land comes; and an ejectment is maintainable upon the mere estoppel."

Again, Lord *Denman* says, "As he took nothing in the land from either Burton or his assignees, no estoppel could affect him through them." This, I think, must have the same meaning as the sentence quoted above.

In this case, as already noticed, Stanton certainly conveyed to Cameron with apt words to pass a reversion in fee.

In the deed executed after the Chancery sale, Patterson, "according to his estate, right, title, and interest as such mortgagee as aforesaid," bargains, sells, and releases; and Cameron, "according to his estate, right, title, and interest as such trustee as aforesaid," bargains, sells, and releases; and Stanton, (with no words as to his estate,) grants, bargains, sells, aliens, releases, ratifies, and confirms to Jones, his heirs and assigns, the land, and the reversions, remainders, rents and profits, and all the estate, right, title, inheritance, use, trust, property, possession, benefit, and equity of redemption, claim and demand at law and in equity, of the parties thereto. *Habendum* to Jones and his heirs in fee, subject to March's lease, as already noticed.

It may be that as this deed is worded it may be argued that Cameron, then the assignee of Stanton, does not profess to give any greater estate than he had by Stanton's deed to

him; that he only conveys "according to his estate as trustee."

But, according to Baron *Martin's* exposition of this kind of estoppel, it may be well suggested whether the estate in reversion by estoppel was not created by the lease, and passed certainly to Cameron by Stanton's first deed to him; and having so vested in Cameron, was there anything in the deed after the Chancery sale to destroy such reversion?

In this deed we find Cameron only conveying according to his estate as trustee, joining with Patterson, the legal owner, who also conveys according to his estate as mortgagee, and all uniting, as it were, in the one grant and one *habendum*. This would seem to amount to "apt words," or at all events does nothing to negative the idea that he is conveying the full estate already vested in him (and which was a legal reversion in fee by estoppel) to Jones. In the deed in *Cuthbertson v. Irving*, by which the lessor sold to the plaintiff, the mortgage is recited, and the lessor (owner only of the equity of redemption) declares that he sells "in exercise of all powers enabling him." He uses general words sufficient to pass the fee, though the recitals shew the fee was not in him, and he conveys subject to the mortgage already given and subject to the outstanding lease.

Can it be said, as in Lord Downe's case, that the purchaser took nothing, that is, professed by the deed to take nothing, from the party representing the equity of redemption? So far from taking nothing from Cameron, the purchaser Jones by the deed declares that it is part of the bargain by which he acquires the estate that as a large surplus of purchase money remains after paying off Patterson's mortgage, he is to mortgage the premises to Cameron for the express purpose of applying such surplus to the trusts already created, and he obtains the several parties interested to join in the deed, by which he obtains a complete title to effectuate this purpose.

My impression is that the deed, as far as Cameron is concerned, is sufficient, under the rule laid down in *Cuthbertson v. Irving*, to pass a reversion in fee by estoppel to the purchaser.

All this argument is urged by defendant to shew that Jones could act as Lord Downe was permitted to do, and wholly repudiate the lease to March; and that as the estoppel is gone as to the assignee of the landlord, so it is equally at an end if the assignee of the tenant desires so to consider it.

We must now look at the express reservation of March's lease as an existing term recognised both by the owner of the fee-simple and the party holding the whole of the landlord's interest. Jones purchased from Magrath, who bought at the Chancery sale on the express condition of sale that it was to be subject to March's term. Then in the deed the owner of the fee-simple, who was not of course bound by the lease as executed long after his mortgage in fee, expressly assents to the term, and conveys to Jones, to hold to him subject to the interest thereby created.

It is here proper to notice the doctrine already alluded to was laid down by *Martin, B.*: "Where a lessor by deed grants a lease without title, and subsequently acquires one, the estoppel is said to be fed, and the lease and reversion then take effect in interest, and not by estoppel."

If we assume a good legal reversion by estoppel in Stanton, conveyed by him to Cameron, and by the latter to Jones; then if Jones, having before this no legal title, acquires the legal estate from Patterson, the above doctrine may apply. In this case the same instrument by which Jones comes in under Cameron vests in him the legal estate. This may suggest doubts, but I am not prepared to say they must necessarily prevent the application of the rule.

The case of *Sturgeon v. Wingfield*, (15 M. & W. 226,) may be noticed. The tenant sued the assignee of the reversion on a covenant running with the land. In May, 1835, one Hogarth leased to the plaintiff for twenty-one years. The farm was leased by the Broderers' Company to one Foster for one hundred years, from Michaelmas, 1741, with covenant for renewal. In 1827 the term vested in one Bray, who assigned to Fleming and others in mortgage. After this Hogarth made the lease, having then nothing at law.

In January, 1836, (after the lease,) Fleming, Hogarth, et

al., surrendered the term to the Broderers' Company, and on the same day the company made a new lease to Hogarth for one hundred years, and soon after the residue of this term vested in defendant.

*Parke*, B., said, "Here the reversion by estoppel, being a reversion in fee, never was surrendered: it remained, therefore, (so far as regarded the plaintiff,) in Hogarth, until he assigned it to the defendant. The lease to the plaintiff was at first good by way of estoppel only; but when Hogarth took from the Broderers' Company for one hundred years the lease to the plaintiff became a lease in interest, and the reversion upon it was afterwards assigned to defendant. . . . The estoppel was fed by the demise for one hundred years from the Broderers' Company to Hogarth, the lessor, and thereby the lease from him to the plaintiff became good in point of interest."

My opinion on this point is, that either the plaintiff, Cameron, on the chain of title shewn to us, is in under Stanton, and holds his reversion by estoppel, and is clothed with all his rights as against the lessee and all in privity of estate with him; or that the effect of the deed executed after the Chancery sale, in which the owner of the legal estate assents to the lease and conveys the whole estate subject thereto, and with that term carved out of it, and thereby the lease from Stanton to March is set up and becomes "good in point of interest."

It remains to consider the objection as to the present plaintiff, Cameron, having before this action was brought executed a certificate of discharge.

It is urged that as the plaintiff executed the statutable certificate of payment, the registration thereof destroyed all his right as completely as if the mortgage had never existed.

The 59th section of the Registry Act, (Consol. Stats. U. C., ch. 89,) provides that the certificate of payment shall when registered be as valid and effectual in law as a release of such mortgage, and as a conveyance to the mortgagor, his heirs, &c., of his original estate; and if given after the time for performing the condition, "shall have the effect of defeating any title remaining vested in the mortgagee, or

his heirs, executors, administrators or assigns, but shall not have the effect of defeating any other title whatsoever."

I read this clause as simply providing for an easier method of discharging the mortgage and clearing the registered title than the ordinary course of a reconveyance, which would require registration as any other deed; and I do not think it introduced any new or destroyed any old right as between mortgagor and mortgagee, or those holding under them, or in any way altered the rules of law affecting a case like the present.

I therefore treat it as if on a day previous to this suit the mortgagee had reconveyed the estate to Jones, the mortgagor. In a court of law I think I must treat it precisely as if the plaintiff, Cameron, owning the entire reversionary interest, had conveyed it to Jones or any stranger, and notwithstanding such sale brings an action against a tenant for rent accruing due before he so parted with his estate.

It appears to me he can bring such an action. In *Platt on Covenants*, 538, it is said, "A right of action once vested and attached in the grantor for a breach in his own time, will not be defeated by his assignment over; . . . for the contract, which was transferred by the statute, still remains as to that breach, though the privity of estate is gone." He cites *Midgley v. Lovelace*, (*Carthew*, 289; *S. C.* 12 *Mod.* 45; *Holt*, 74,) *Anon. Skin.* 347. The same view seems taken in *Platt on Leases*, vol. ii. p. 386. In *Comyn's Landlord and Tenant*, 268, the same principle is adopted: "If a breach happen in the time of the grantee, and then he assign the reversion over, he may bring covenant against the lessee for the breach so happening in his time, notwithstanding he has parted with the estate."

I do not feel pressed by any of the difficulties suggested in applying this rule to the case of a mortgagee. In this court I treat him as the owner of the reversion, and as such entitled to the rents accrued due whilst seised of the reversion. The application of such rents when recovered can only be a question between him and the mortgagor. In an ordinary case, and most probably in this, the suit would be brought by an understanding between the parties. In the

case of a paid-up mortgage in fee it would be doubtless prosecuted beneficially by the mortgagor, though necessarily in the name of the then reversioner.

I have arrived at the conclusion that the three questions on which the suit seems to depend must be answered in favour of the plaintiff:—

That defendant as mortgagee of the whole term is liable for the rent without entry ;

That the facts shew no destruction of the term by the alleged union of the equitable with the legal estate ; and,

That the position of the plaintiff as mortgagee, bringing this action after registration of the statutable certificate of payment and consequent discharge of the mortgage, does not prevent him from suing for arrears of rent accruing due to him whilst seised of the reversion.

Judgment for plaintiff.

# IN THE MATTER OF GEORGE DAVIDSON, SHERIFF OF THE COUNTY OF WATERLOO, AND THE COURT OF QUARTER SESSIONS IN AND FOR THE COUNTY OF WATERLOO.

*Jurors' Act, Consol. Stats. U. C. ch. 31—Sheriff's fees under—Right to review the audit of quarter sessions.*

Under the Upper Canada Jurors' Act, secs. 105, 161, sub-sec. 4, the sheriff is entitled to charge only for such certificates of attendance as are demanded by the jurors. He cannot prepare them beforehand and charge whether they are asked for or not.

This court can compel the quarter sessions to audit the sheriff's accounts ; but *semble*, such audit being a judicial duty, that they cannot review their discretion when exercised upon a question of fact. They refused therefore to interfere where the court of quarter sessions, after examining the bailiff *vivâ voce*, had disallowed certain mileage for serving jurors, sworn to in his affidavit.

The sheriff is entitled, under sec. 84 and sec. 161, sub-sec. 2, to charge for four copies of panels for the court of assize, \$4—*i.e.* two copies of the panel of Grand and Petit Jurors respectively, one to be sent to each of the Superior Courts at Toronto ; and \$6 for copies of panels for the Quarter Sessions and County Court, *i.e.* for two copies of the panel of Grand and Petit Jurors respectively, for Quarter Sessions, and of Petit Jurors for County Court.

IN Easter Term last *Robert A. Harrison* obtained a rule calling on the Court of Quarter Sessions in and for the County of Waterloo, on notice to their chairman, to shew cause why a mandamus should not issue, commanding them properly to audit the accounts of said sheriff laid before

said court at the sittings in October and March last, by allowing to the sheriff certain items deducted from his October account, namely:—

111 miles to serve jurors, at 8 cents .....	\$8.88
2 copies of Jurors' Panels for Court of Assize .....	2.00
6 copies of same for Court of Quarter Sessions and County Court .....	6.00
125 certificates to jurors served .....	25.00
And the following items deducted from his ac- count rendered to said court in March last:—	
17 miles to serve jurors .....	1.36
6 copies of Panels of Grand and Petit Jurors for Quarter Sessions and County Court .....	6.00
21 certificates to grand jurors .....	4.20
<hr/>	
	\$53.44

And to order payment of the accounts including said items, on the ground that the sheriff having performed the services was in law entitled to be paid for them, and that the disallowance thereof by said court was contrary to law; and on grounds disclosed in affidavits and papers filed.

In Michaelmas Term last *M. C. Cameron* shewed cause. He objected that the rule should be on the magistrates in quarter sessions, and not on the court: that the court had audited and had acted on their discretion, and that they had rejected the claim for mileage considering the evidence insufficient, not on any principle of law. He cited *Rex v. Justices of Kent*, 11 East, 229; *Rex v. Justices of Kent*, 14 East, 395; *Rex v. Justices of Yorkshire*, 2 B. & C. 291; *Regina v. Justices of Wilts*, 8 Dowl. 717. He filed also several affidavits.

*Robert A. Harrison* supported the rule in the same term.

The facts of the case, and the statutes bearing upon the question, sufficiently appear in the judgment of the court, delivered by

HAGARTY, J.—I shall first notice the charge disallowed for certificates of attendance to jurors. Apart from any

technical question as to our right to review the decision of the court of quarter sessions, I am not prepared to say with certainty that I think their view erroneous.

The whole question seems to turn on two clauses of the Jurors' Act.

Section 105 says, "Every juror who has attended and served upon any such panel as last aforesaid, shall (upon application by him made to the sheriff or deputy sheriff before he departs from the place of trial) receive a certificate testifying his attendance and service, and the sheriff or deputy sheriff shall give such certificate upon demand."

Section 161 provides a tariff of sheriff's charges "for the respective services performed by him under this act."

Sub-sec. 5, "For every certificate given to any juror of his having served (to evidence his exemption from serving again until his time for doing so returns in its course) the sum of twenty cents."

As I understand the disputed point, it is this—the sheriff makes out a certificate for every juryman and has it ready, and presents it to each, or leaves it at the treasurer's office for each, whether the juryman asks for it or not. The court of quarter sessions insist that unless the juryman expressly requires it, the sheriff should not prepare or charge for it.

I am hardly prepared to say that the latter view is not the true one.

The certificate seems certainly intended by Parliament for the benefit of the juryman, and compels the sheriff to give it "upon demand."

That the latter officer may not be compelled to work for nothing, he is allowed twenty cents "for every certificate given to any juror of his having served."

The juror is not bound to ask for it; nor is the sheriff, I think, bound to provide it unless asked for.

It would seem an unsafe principle to introduce into practice, that whenever the law allows a party to get a certificate in a cause, or in anything connected with legal proceedings, the official, who is bound to give it if required, may always take it for granted that it will be required, prepare it beforehand, and require payment from some public fund on which

the burden is cast by law if the officer be required to do the work.

I think the applicant fails on this part of his case.

I now turn to the disallowed mileage items.

The case made by the sheriff is, that he put in the affidavits of his bailiff stating the number of miles travelled to make each service. He gives up copies of them. He states that the quarter sessions examined the bailiff *vivâ voce* thereon, and that his evidence was to the same effect as the affidavits, but the court decided on striking off from one account 111 miles, and from another 17 miles, not specifying how many miles were taken from each service.

He also produces affidavits from two of the justices in quarter sessions, advocating his view of the reasonableness of his claim.

His counsel rested chiefly on section 164 of the Jurors' Act: "Upon proof by affidavit, &c., of such several services having been executed, or in the case of the sheriff of such travel having been necessarily performed in going to effect the service of such summonses, the affidavit being accompanied with a detailed account shewing the number of miles actually and necessarily travelled in going to serve each juror, (so that at the end of the service the officer summoning the jury shall only be entitled to mileage for the number of miles actually travelled,) *and upon the account being properly audited, and an order of the court of quarter sessions being made for the payment thereof,*" the treasurer shall pay, &c.

It is conceded that the auditing of the sheriff's accounts justly pertains to the court of quarter sessions. I assume that in making such audit the court acts judicially, and not merely ministerially.

As an inferior court we can of course compel them to audit; but where they do actually audit, examine, and pass judgment upon the account, disallowing part of the mileage claimed and allowing the rest, I cannot see my way to the right to review their discretion. To do so would be of course to transfer the duty of audit, that is, of any audit in which any discretionary powers rested from the quarter sessions to this court.

The very statements made by the applicant of the kind of proof he offered, and the course taken by the court in orally examining his bailiff as to the services, to my mind justify the directions of the Legislature in vesting in a local court, presided over generally by the county judge, and required to have a certain number of members always present, the duty of examining into the accuracy of the claims made by officials on a public fund. The members of such a court from local knowledge ought to be especially qualified to sift each claim for mileage, and to ensure due protection to the county treasury.

I cannot enter into any discussion as to the peculiar accuracy or inaccuracy of the disputing parties in disposing of the question. No principle of law is suggested to be involved in the decision.

Assuming that the court of quarter sessions act judicially in auditing these accounts, I must further express my regret at the production of affidavits from two of the functionaries there presiding, to aid an application against the decision of their coadjutors.

This part of the claim also in my opinion fails.

It remains to consider the charges for copies of "panels." No explanation has been offered in the papers before us of any grounds on which these items were rejected.

Two copies are demanded for the court of assize, six copies for court of quarter sessions and county court, and in another account six copies of panels of grand and petit jurors for quarter sessions and county court.

Hardly aware of the view taken by the court of quarter sessions on these claims, I must merely express my opinion formed from the statute.

Under section 59 of the Jury Act, the courts of assize and nisi prius, and quarter sessions of the peace, and county court, issue precepts to the sheriff for a competent number of grand and petit jurors.

By section 60 the sheriff may return the same panel of petit jurors for quarter sessions and county court, when the same day is appointed for their sitting.

By section 75 the sheriff shall to each precept return a

panel of the names of the jurors contained in the proper jury list for the year, whose names shall be drafted from the list in manner after provided.

Section 84 directs the sheriff, on his return of the writ of *Ven. Fac.*, or precept under authority of which the panel is drafted, to *annex a panel* to the said *writ or precept*, containing the names, &c., of those drafted in such panel, and to transmit one copy thereof to the office of the clerk of the peace for the proper county, and another to the Clerk of the Crown and Pleas of her Majesty's Court of Queen's Bench at Toronto, or to the Deputy Clerk of the Crown, as the case may be.

Then in section 161, giving the tariff of sheriff's fees, it provides, "For each panel of jurors, whether grand or petit, returned and summoned by him in obedience to any general precept for the return of grand or petit jurors for any sittings, &c., of assize and nisi prius, &c., sessions of the peace, or county or recorder's court respectively, under this act, four dollars."

Sub-sec. 2. "For copies of such panel to be returned to the offices of the superior courts of common law at Toronto, each, one dollar."

It seems to me that the propriety of the charges must rest on these clauses.

A difficulty occurs from the relative wording of clauses 84 and 161.

By the first clause, 84, having annexed a panel to the precept, (apparently without reference to the court from which it issues,) he is to send one copy to the clerk of the peace of the proper county, and another to the Clerk of the Queen's Bench at Toronto, *or to the Deputy Clerk of the Crown, as the case may be.*

Now if this clause stood alone, it might be assumed that only two copies of each panel annexed to a precept should be returned by the sheriff, one to the office of the clerk of the peace for the county; and if in York and Peel to the Clerk of the Queen's Bench, and if in an outer county to the Deputy Clerk of the Crown. In no other way can I understand the peculiar wording, "as the case may be."

But the tariff, section 161, after allowing the sheriff four dollars for every panel, grand or petit, returned to any general precept for either superior or inferior courts, proceeds thus : " For copies of *such panel* to be returned to the offices of the superior courts of common law at Toronto, each, one dollar."

Now these words would appear to intimate that a copy of every panel for assizes and quarter sessions and county court and recorder's court was to be sent to the Queen's Bench and Common Pleas at Toronto.

It is not easy to understand the object of the Legislature in making any such provision for the inferior court panels even if considered necessary as to the assize panels.

This reading, if adopted literally, would compel the sheriff on every panel, from whatever court, to send one copy (under clause 84) to the clerk of the peace, and one to each of the superior courts, or three copies of each panel. But the only fee allowed by the tariff for copy of panel is for copies to be returned to the offices of the superior courts in Toronto, and his right to charge any fee whatever must depend on the tariff's language.

At the assizes there would be two panels for grand and petit jurors, then he would seem entitled to \$1 for a copy of each for the Courts of Queen's Bench and Common Pleas in Toronto, \$4 in all.

The same fees for copies would be allowed in the quarter sessions and county court jury panels; as there would be three panels, then six copies: that is, assuming that a precept goes from the quarter sessions to return a panel of grand and petit jurors, and one from the county court for petit jurors, the sheriff would annex a grand and petit jury panel to the quarter sessions precept, and a petit jury panel to the county court precept, though the same names of petit jurors would be in each panel.

As the act is drawn I hardly see any other manner in which I can construe it.

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IN THE MATTER OF POUSSETT, CLERK OF THE PEACE FOR  
THE COUNTY OF LAMBTON, AND THE COURT OF GENERAL  
QUARTER SESSIONS FOR THE COUNTY OF LAMBTON.

*Clerk of the peace—Fees.*

The clerk of the peace, under Consol. Stats. U. C., ch. 124, and the tariff of 1862, No. 57, is entitled only to one dollar for each quarterly return of convictions made by him to the Minister of Finance, not to one dollar for the list of convictions sent to him by each justice and included in such return.

The drafting the panel from the jury list, under the Jurors' Act, Consol. Stats. U. C., ch. 31, sec. 78, is not a special sessions of the peace, and the clerk therefore is not entitled to charge for it under No. 66 of the tariff.

The clerk is required, by Consol. Stats. U. C., chaps. 19, 120, to record and notify to the government and to the clerks of each division court only the acts of the *quarter sessions* with regard to the limits of the different divisions, not the orders of the judge as to the times and places of holding the courts; and he is not entitled therefore, under the tariff, Nos. 38 to 43 inclusive, to charge for such last-mentioned orders.

*Christopher Robinson*, in Hilary Term last, obtained a rule *nisi* for a mandamus to the court of general quarter sessions for the county of Lambton, commanding them to audit and allow to Mr. Poussett the following charges, or so many of them, and such an amount therefor respectively as might be adjudged:—

Drawing up quarterly return of convictions for  
eighteen lists of justices, for each list \$1.....\$18.00

Attending special sessions of justices to draft  
jurors for September sessions. .... 2.50

Filing order for the times and places of holding  
the division courts in the month of June..... 0.08

Entering above order in the book of orders..... 1.00

Copy for provincial secretary. .... 1.00

Copies for clerks of the seven courts. .... 7.00

For the first item the quarter sessions had allowed only  
\$1. The other items they had disallowed altogether.

*Robert A. Harrison* shewed cause during the same term.

The statutes and the items in the tariff bearing upon the points in dispute, with the grounds upon which the several charges were claimed and objected to, are sufficiently stated in the judgment.

HAGARTY, J.—I do not feel any reasonable doubt as to

the construction to be placed on chapter 124, Consol. Stats. U. C.

Every justice of the peace is, by section 1, bound to make a return of every conviction to the next ensuing general quarter sessions, and when two justices act the return is to be immediate, and he is also to make a return of moneys paid to him thereon, which return the clerk of the peace is to file with the records of his office.

Section 4 enacts that the clerk of the peace shall, within seven days after the adjournment of the quarter sessions, publish such returns, and also fix up in his office for public inspection "a schedule of the returns so made by such justices," to remain up for a specified time, and for every schedule so made and exhibited by the said clerk of the peace he shall be allowed in his accounts four dollars, besides the expense of publication.

Section 5 directs the clerk of the peace, within twenty days after the end of the quarter sessions, to transmit to the Minister of Finance "a true copy of all such returns made within his county."

Chapter 33, Consol. Stats. C., sec. 36, directs all clerks of the peace to return to the board of registration and statistics in triplicate lists of all convictions had either before courts of quarter sessions or before individual magistrates in their respective counties.

I have no doubt that the act first cited merely contemplates one general schedule, to be periodically prepared by the clerk of the peace, embracing all the returns made by the justices to such period, and that the sum of \$4 is his fixed fee therefor.

We are also referred to the tariff of fees settled by the judges in 1862. No. 57 allows a fee of \$1, for "Making out and transmitting to the Inspector-General a return or schedule of all convictions which have taken place before any justice or justices, or before the court, each list \$1."

This, I think, means each list sent by him, as directed by the statute, within twenty days after every court of quarter sessions, in fact, four lists or schedules annually.

I cannot consider the proceedings on drafting of the panel

from the jury list, under section 78 of the jury law (Consol. Stats. U. C., ch. 31), as tantamount to a special sessions of the peace, and thus within number 66 of the tariff. The sheriff attends, according to public notice, at the office of the clerk of the peace, and in the presence of the clerk of the peace and any two justices proceeds to draft. By section 83 he draws a ballot and declares the number, whereupon the clerk of the peace or one of the justices of the peace present declares the number aloud; and by sub-sec. 3 the sheriff marks down the name corresponding thereto, and when all is done the names of the sheriff or deputy, and of the clerk of the peace and justices present, or at least of two of them, shall be entered in the book and attested by them, &c.

Nothing herein seems to indicate the acts of a court, nor is the clerk of the peace as such directed to record anything as the act of a court.

It remains to consider a class of charges made by Mr. Poussett. "Filing order for the times and places of holding division courts in the month of June. Entering that order in the book of orders. Copy for Provincial Secretary; and copies for clerks of the seven courts."

The point in dispute seems to stand thus—after each division court the judge names the time and place for the ensuing court, and the charges are all made in reference to this. The magistrates urge that unless some change be made by them in the limits of division courts the charges are improper.

In the schedule of services performable by the clerk of the peace attached to chapter 120, Consol. Stats. U. C., are several items:—

"Making up books of orders of sessions, declaring the limits of the division courts, and entering the times and places of holding the courts—

"Making out and transmitting a copy thereof to the government—

"Making out and transmitting copies (with letter) to the clerk of each division court, of the divisions made by the quarter sessions—

"Drawing orders of sessions for altering the limits of division courts—

"Making out and transmitting copies of such orders to the government—

"Making out and transmitting copies of such orders to each division court affected by the alteration."

The items in the tariff of 1862, numbers 38, 39, 40, 41, 42, and 43, fixing fees for such services, describe them exactly as in the statute.

I am of opinion that these charges refer to the fixing or altering the limits of division courts by the court of quarter sessions, under the authority vested in them by chapter 19 of the Consol. Stats. U. C., known as the Division Courts Act. Section 8 gives this power, and section 15 directs the clerk of the peace to record the divisions declared and appointed, and the time and places of holding the courts, and the alterations from time to time made therein, and he shall forthwith transmit to the Governor a copy of the record.

Section 6 directs that a court be held in each division once in every two months, or oftener, in the discretion of the judge, and the judge may appoint and from time to time alter the times and places within such divisions when and at which such courts shall be holden.

I cannot believe that the Legislature intended to impose the duty on the clerk of the peace of notifying the provincial secretary and each of the seven clerks of division courts every two months of the days appointed by the judge for holding the ensuing courts.

It seems to me his duty is confined to recording and notifying to the government and to the different clerks every act done by the court of quarter sessions, under the authority of the statute, as to the arranging, fixing, or altering the limits of the different courts.

Both statute and tariff seem to me clearly so to indicate.

It is quite true that in the list of services attached to the statute we find "Making up books of orders of sessions, declaring the limits of the division courts, *and entering the times*

*and places of holding the courts,"* and the tariff adopts the same words, and section 15 of the Division Courts Act, cited already, directs him "to record the divisions declared and appointed *and the time and places of holding the courts.*"

But we cannot, I think, avoid the conclusion, that to entitle him to do the work and charge therefor the fees prescribed by the tariff, he must shew that the appointments or orders for times and places of holding the courts, which he sends to the government and the different clerks, are orders or acts of the court of quarter sessions.

This he cannot do, and I think he must therefore fail.

*Per cur.*—Rule discharged, without costs.

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ROBISON, EXECUTOR OF THE VERY REVEREND GEORGE  
O'KILL STUART V. FLANIGAN.

*Covenant—Pleading.*

*Declaration*, by executor of S., on a covenant made by defendant on the 10th of January, 1855, to pay S. £240, with interest, by six instalments of £40 each, on the 1st of August in 1855, and of each year following.

*Second Plea*, that by an agreement in writing, prior to the deed declared on, it was mutually agreed between defendant and S. that defendant should pay S. £210, in which sum defendant was then indebted to him, as follows: £35 on the 1st of August, 1854, and £35 on the 1st of August annually thereafter, and that such payments should be made in meat from defendant's stall; and further, that defendant should execute a mortgage or deed to S. as security for the fulfilment of such agreement. That defendant did accordingly execute his mortgage or deed to S. for that purpose: that the said sum of £210 was fully paid to S. before his death: that defendant in all respects kept the said agreement, and that the deed declared on is no other than the deed mentioned in such agreement, and so executed to secure the fulfilment of the same.

*Held*, on demurrer, plea bad, for it was not alleged that the £210 formed any part of the £240 for which the covenant sued on was made, or that there was no other consideration for such covenant than to secure the £210.

*Third plea*, that by a certain deed, dated 9th July, 1856, made by defendant and S., it was agreed as in the second plea set forth; and to secure the performance by defendant of such deed it was agreed therein that defendant should sign a mortgage as a lien upon a certain conveyance or title theretofore given by S. to defendant: that defendant did execute such mortgage to S., and faithfully performed his part of said agreement, and that the deed declared on is the mortgage so executed, and ought not to be enforced against him.

*Held*, clearly bad, on the same grounds as the second plea, the absence of consideration for defendant's express covenant to pay the £240 and interest not being in any way shewn.

*Fifth plea*, that before breach of the covenant declared on, S. accepted from defendant the sum of £210 in goods in full satisfaction of said sum of £240, and of the cause of action declared on, and by deed released defendant therefrom.

On demurrer to this plea except as to the allegation of release, *held*, that the rest might be rejected as surplusage, and that it shewed a good defence.

*The sixth plea* was, that before breach defendant satisfied and discharged the plaintiff's claim by delivering goods to S., which he accepted in full satisfaction. *Held* bad, as accord and satisfaction cannot be pleaded to a deed before breach.

DECLARATION—For that the defendant on the 10th of January, 1855, by deed covenanted with the said George O'Kill Stuart to pay to him £240, with interest thereon after the rate of six per centum per annum, on the days and times and in manner following: that is to say, the said sum of £240 payable by six annual instalments of £40 each, the first instalment payable on the first day of August then next, and the remaining five instalments of £40 each payable in

annual succession thereafter on the first day of August in each and every year, with legal interest on the same as each instalment becomes due, until the whole sum of £240 and the interest as aforesaid are fully paid and satisfied; but the said defendant did not pay the same or any part thereof. The plaintiff, as executor as aforesaid, claims £360.

*Second plea*, that by a certain agreement in writing between the said defendant and the said George O'Kill Stuart in his lifetime, and prior to the deed mentioned in the declaration, it was mutually agreed between them that the defendant should pay to the said George O'Kill Stuart, his executors, &c., the sum of £210, in which sum the defendant was then indebted to the said George O'Kill Stuart, in manner following, that is to say, the sum of £35 on the first day of August, 1854, and a like sum of £35 on the first day of August annually in each year thereafter, until the said sum of £210 should be fully paid; and it was further thereby agreed between them that the said annual payments should be made in supplies of meat from the stall of the defendant in the market-house, Kingston, and that should the supplies of meat to the said George O'Kill Stuart in one or any of the years of the currency of the agreement exceed the annual payment of £35, the overplus in amount, above the sum of £35, so supplied by the defendant, should be accounted for by the said George O'Kill Stuart and placed to the credit of the defendant in payment in whole or in part of the then following year's payment, until the said sum of £210 should be fully paid within the stipulated period, or sooner if practicable, by the said defendant; and that in the event of the death of the said George O'Kill Stuart before the time limited as aforesaid for the payment of the said sum of £210, the amount then remaining due by the defendant under the said agreement should be paid by him or his executors, &c., to the executors, &c., of the said George O'Kill Stuart; and it was then further agreed between the said George O'Kill Stuart and the defendant that the defendant should execute and deliver a mortgage or deed to the said George O'Kill Stuart as security for the certain fulfilment of the said covenant of agreement by the defendant. And the defendant avers that

according to and in pursuance of such agreement, he did execute and deliver his mortgage or deed to the said George O'Kill Stuart in his lifetime as security for the performance by the defendant of the said agreement: that the said sum of £210 has been fully paid up and satisfied to the said George O'Kill Stuart before his decease, according to the terms, nature, and effect of the said agreement, and before the time stipulated for the payment thereof, and no amount remained due thereon at the time of his death by the defendant: that the defendant hath in all respects, matters, and things kept and performed his part of the said agreement; and the deed mentioned in the declaration is no other than the deed mentioned in the said agreement, and executed and delivered to the said George O'Kill Stuart by the defendant in pursuance thereof, to secure the certain fulfilment of the same by the defendant.

*Third plea*, that by a certain deed or indenture, dated the 9th of July, 1856, made by the said defendant and the said George O'Kill Stuart, it was then mutually covenanted and agreed between them as in the second plea set forth and expressed; and for the certain performance by the defendant of his part of the said deed, it was declared and covenanted in and by the said deed that the defendant should sign a mortgage or deed as a lien or encumbrance upon a certain title in law or deed of conveyance before then given by the said George O'Kill Stuart to the said defendant, as security for the performance by the defendant of his covenant as aforesaid; and the defendant avers that he did execute and deliver his mortgage or deed to the said George O'Kill Stuart, in pursuance of his covenant in that behalf, as security for the performance by him of his part of the said deed in the first part of this plea mentioned, according to its tenor and effect; that the defendant faithfully performed his part of the said deed before the death of the said George O'Kill Stuart, and according to the covenants therein; and that the deed declared on in this cause is the same deed or mortgage so executed and delivered to the said George O'Kill Stuart under the deed in the first part of this plea mentioned, as security as aforesaid by the defendant, and ought not to be enforced against him.

*Fifth plea*, that before breach of the covenant in the deed in the declaration mentioned, and before action brought, in the lifetime of the said George O'Kill Stuart, and before the said sum of £240 became due and was payable to the said George O'Kill Stuart, he accepted and received from the defendant the sum of £210 in goods delivered to the said George O'Kill Stuart in full satisfaction of the said sum of £240, and of the cause of action in the declaration mentioned, and by deed released the defendant therefrom.

*Sixth plea*, that before the breach of the covenant in the declaration mentioned, and in the lifetime of the said George O'Kill Stuart, the defendant satisfied and discharged the plaintiff's claim by delivering goods to the said George O'Kill Stuart, which he accepted and received in full satisfaction and discharge of his claim.

The plaintiff demurred to the second and third pleas, on the grounds that payment of the sum of £210 and interest is set up in satisfaction of a greater sum, and that it does not appear that the said sum of £210, in the second plea mentioned, is any part of the £240 in the declaration mentioned; and he demurred also to the fifth plea, except so much thereof as alleges that the said George O'Kill Stuart by deed released the defendant, and to the sixth plea, on the ground that accord and satisfaction is not a good plea to the plaintiff's cause of action.

*Stephen Richards*, Q. C., for the demurrer, cited *Spence v. Healey*, 8 Ex. 668; *Mayor, &c., of Berwick-upon-Tweed v. Oswald*, 1 E. & B. 295; *Kaye v. Waghorn*, 1 Taunt. 428; *Christopherson v. Bare*, 11 Q. B. 73.

*Read*, Q. C., contra, cited *Harris v. Goodwyn*, 2 M. & G. 405; *Neal v. Sheafffield*, Cro. Jac. 254; *Steinman v. Magnus*, 11 East, 390; Add. Con. 1091-92, 1094-95.

McLEAN, C. J.—The second plea is manifestly bad. It tries to set up as a defence that the covenant declared on, which is for the *absolute* payment by certain instalments of the sum of £240, with interest, is the mortgage or deed which by some agreement, not alleged to be under seal, he undertook to execute and deliver to the said George O'Kill Stuart as security for the performance by the defendant of

the said agreement. The defendant acknowledges that he owed to the testator at the time the agreement was entered into (before the giving of the deed now sued on) a sum of £210, to be paid up by instalments of £35 in each year in meat from his stall in the Kingston market; and he alleges that the amount of the said £210 was paid to the testator before his death, but he does not say that the sum of £210 formed any part of the sum of £240 for which the covenant sued on was made, or that there was no other consideration for the covenant of £240 but the £210, and the securing the payment of that amount in manner and at the times mentioned.

The defendant alleges that he was indebted to the testator in £210, to be paid by certain instalments, one of which was to become due on the first day of August, 1854, which was prior to the date of the covenant declared on, (10th January, 1855,) and there is no allegation that the debts were the same, or that any portion of the sum of £210 was identical with the sum of £240 covenanted to be paid at different times, and in different and larger instalments than the sum of £210. There is not anything in the plea to shew that the sum sued for may not be a distinct sum from the £210 acknowledged to have been due at the time of the alleged agreement, or that by the payment of the £210 any part of the £240, or the interest thereon, has been paid to the testator.

By the third plea it appears to be intended by the defendant to set up some agreement under seal, such as in the second plea is alleged to have been made in writing, for the payment of the sum of £210 in the manner and at the times set forth in that plea; and the defendant alleges that the deed declared on in this cause is the same *deed or mortgage* so executed and delivered to the said George O'Kill Stuart under the said deed in the first part of this plea mentioned, as security as aforesaid by the defendant, and ought not to be enforced against him.

There is no statement in this plea that the mortgage was given to pay the same money which by the terms of the deed dated the 9th of July, 1856, was to be paid in the manner and at the times alleged in the second plea to be contained in an agreement in writing made and entered into

before the said mortgage declared on in this cause was executed.

In the second plea the agreement in writing is alleged to have been made before the deed sued on in the declaration. In this plea a particular date is given, 9th July, 1856; and it is alleged that by that deed, executed eighteen months after the date of the mortgage, it was mutually covenanted and agreed between them as in the second plea set forth and expressed, and that for the certain "performance by the defendant of *his part of the said deed*" it was covenanted that a mortgage or deed should be *signed* by the defendant as a lien or encumbrance upon a certain title in law or deed of conveyance before then given by the said George O'Kill Stuart to the defendant, as a security for the performance by the defendant of his covenant as aforesaid. The defendant then alleges that he executed the mortgage sued on as security for the performance by him of *his part of the said deed* according to its tenor and effect.

It is for the defendant to shew how a mortgage bearing date 10th January, 1855, can possibly have been given to secure the performance of covenants contained in a deed dated 9th July, 1856, eighteen months subsequent to the mortgage. I confess that I am wholly unable to comprehend the defence set up, or the manner in which it is attempted to be set up. It is not alleged that the sum of £210, stated in the second plea to be due and to be paid according to the terms of an agreement in writing, and in the third plea alleged to be payable according to the terms of a *deed* bearing date the 9th day of July, 1856, was the *whole* amount due by the defendant to the late George O'Kill Stuart, nor is there any averment that the moneys were to be paid on account of the same debt, or that there was no other consideration for the covenant to pay £240 and interest except the debt admitted to be due of £210.

It appears to me that this plea is even worse than the second plea, and that both are undoubtedly bad, not shewing in any intelligible form the defence intended to be set up.

The plaintiff has demurred to that part of the fifth plea which alleges the delivery of goods in satisfaction and the

acceptance of goods amounting to £210 in full for the sum of £240, on the ground that accord and satisfaction before breach is not a good plea in bar of the plaintiff's action. If, however, that part of the plea may be rejected or considered as surplusage, the allegation that the testator *by deed released the defendant* from the payment of the money contained in the covenant still remains as a substantive allegation, and is a good answer to the declaration on a *covenant* for the payment of that money. If the defendant has in fact been released by deed from the performance of his covenant, the plaintiff can have no right of action to enforce it. The plea must be taken as a *whole*; and the statement of a release by deed having been given by the testator cannot be affected by the prior part of it, so that, however bad that part may be in law, the allegation of a release by deed entitles the whole to be considered so far good that it is not demurrable. I think, therefore, that the defendant is entitled to judgment on the demurrer to part of that plea, inasmuch as the plea does contain a good answer to the plaintiff's declaration.

The sixth plea is much the same as the fifth, except that it does not contain the important allegation of a release by deed, and that too is demurred to on the same ground as the portion of the fifth to which the plaintiff has demurred. If the defendant had confidence in the validity of that part of his fifth plea which attempts to set up accord and satisfaction of the testator's claim, I cannot see any object in the sixth plea, unless indeed that, instead of the allegation that the defendant paid and the testator accepted £210 in satisfaction of the sum of £240 before the same became due, the more general statement that the testator's claim was satisfied by the delivery of goods to him, without specifying any amount, is considered preferable.

The plea is, that the defendant before the breach of the covenant in the declaration mentioned, and in the lifetime of the said George O'Kill Stuart, satisfied and discharged the plaintiff's claim by delivering goods to the said George O'Kill Stuart, which he accepted and received in full satisfaction and discharge of his claim.

This is demurred to, on the ground that accord and satisfaction before breach of defendant's covenant is not a good plea in bar of the plaintiff's claim. If this plea is intended as a plea of payment, then it should expressly aver payment; but if it is intended as a plea of accord and satisfaction before breach of the defendant's covenant, then it is clearly bad, for that covenant can only be discharged before breach by an instrument of as high a nature.

In the case of *The Mayor, &c., of Berwick-upon-Tweed v. Oswald et al.*, (1 E. & B. 295,) sureties for one D. Murray as treasurer, a plea that before breach the plaintiff accepted a fresh surety bond in discharge of the deed sued on, was on demurrer held bad, as pleading accord and satisfaction to a deed before breach.

WILSON, J., read the following judgment prepared by Mr. Justice HAGARTY, who was not present:—

As to the third plea, it was not pressed at the argument whether any such answer, not amounting to a distinct plea of payment of the whole sum demanded, nor of accord after breach, nor shewing any fraud or illegality, would be a good legal bar. Apart from any such consideration, I think it impossible to hold the facts as stated to be a good defence. There is no attempt to explain the marked difference in the sums of money and in the amounts of the instalments by which each was to be paid. In the instrument declared on, the first instalment of £40 was to be paid on the 1st of August, 1855. In the instrument said to be executed at some prior time, the first instalment was £35, and was to be paid a year earlier, namely, on the 1st of August, 1854. There is no averment of the identity of any of the moneys in the two instruments, nor, above all, any statement from which even by implication we are to gather that the defendant really owed the testator no more than £210, nor that there was no further debt or liability to which the larger sum of £240 would apply. Taking his averments in the most favourable light to the defendant, hardly warranted by his unusually vague and uncertain pleading, it amounts only to this—that the deed sued upon for the larger sum was

given as a security for a smaller debt between the same parties; without any explanation of the variance in the amounts nor of the different modes of payment, and in no way negating the existence of some other good consideration for defendant's express agreement to pay the larger sum with interest to testator.

I think it would be to abandon all certainty of allegation, even in these days when special demurrers have passed away, to allow such a plea to be a good answer to a plain money demand on a specialty.

I think the plea bad.

The third plea is also demurred to. I need not repeat the remarks made by me as to the second plea. They apply with equal if not greater force to the third plea. There is the same total want of precision or certainty of allegation, and the same silence as to the presence or absence of any consideration for the express covenant to pay the larger sum with interest. We cannot assume or infer that a man covenants to pay money without consideration; and whether the reference be to bills, or notes, or specialties, I have always understood that against the clear *prima facie* liability to pay the sum named there must be the express allegation of absence or want of consideration for paying the same, or some intelligible reason shewn why it should not be paid according to contract.

I may also notice the unexplained discrepancy in dates. The deed set up by the plea is stated to be dated eighteen months after the deed sued upon, without any averment otherwise fixing the actual time.

I think this third plea bad.

The fifth plea begins by averring that before breach or action brought the testator accepted £210 in goods delivered to him in full satisfaction of the said sum of £240, and of the cause of action in the declaration mentioned, *and by deed released the defendant therefrom.*

The plaintiff to this plea, except as to so much as alleges a release, demurs.

I agree with the plaintiff that this part of the plea demurred to by itself forms no defence; but as all this might

be rejected, and the plea be still good as a plea of release, I do not see his right to demur. It can hardly be regarded as an independent allegation; it may be merely introductory, as explaining, although unnecessarily, the grounds on which the release was given.

If the plaintiff apprehended that by merely denying the release he would have admitted the preceding averment as an intended bar, he could easily have protected himself by traversing that averment also.

The sixth plea is much the same, without the release—accord and satisfaction by delivery and acceptance of goods before breach.

I think it a bad plea.

WILSON, J.—The question is whether these pleas are good in substance.

The declaration sets forth a deed dated the 10th of January, 1855, as containing in itself the sums and the times of payment of these sums to be made by the defendant to the testator.

The second plea does not deny the deed in the declaration. On the contrary, it asserts the deed in the declaration to be no other than the deed in the plea mentioned, although this plea sets out a deed without date, but made before the deed in the declaration, as the first instalment, according to the plea, was to be made on the 1st of August, 1854, while the deed in the declaration is dated the 10th of January, 1855.

It also sets out a sum of a different amount to be paid—of different instalments—without interest—at different times, and to be payable in meat at the defendant's market stall in Kingston, and not in money.

And lastly, it does not shew that *this deed* contains these or any other particulars, but only that all these matters are contained in an agreement in writing between the defendant and the testator, and that the deed in the plea mentioned was given only in security for the performance by the defendant of the agreement.

Now it is manifest these two deeds cannot be one and the

same. If the plea be true, a mere denial of the deed set out in the declaration will meet the defence; but such a plea as this leaves the declaration uncontradicted, and sets up a state of facts apparently for no other purpose than to defeat the plea itself.

I do not lay any stress on the mere discrepancy of dates of the deeds mentioned in the declaration and in the plea, for the plaintiff would not be bound to prove the precise day stated in his declaration; but the allegation that the agreement in writing (and I am left to assume that the deed to secure its performance was contemporaneous with it, or was at any rate made before the deed declared on) was made "prior to the deed in the declaration mentioned," is such a precise allegation, and shews such a discrepancy, not of dates only, but of the instruments themselves, that the two pleadings cannot both be true, nor the two deeds be the same deed, which the defendant undertakes but fails to shew.

This is in truth a plea that a deed (though not the deed mentioned in the declaration) was given by the defendant to secure the performance of an agreement in writing, and he chooses to assume that the deed he so alleges to have been given for such purpose is the deed mentioned in the declaration.

The allegation of payment of the £210 under the agreement cannot, under these circumstances, be any answer to the claim of £240 and interest upon a different agreement made by the declaration.

The third plea sets up an agreement by deed to the effect of the agreement in writing in the second plea mentioned, dated the 9th of July, 1856, a wholly different date again from that declared upon, and from that also stated in the second plea, and differing also from the declaration in all the other particulars already pointed out as to the second plea.

The defendant then alleges that by this deed of the 9th of July, 1856, he agreed to sign a deed as security for performance of his covenant, and that he did do this; and then he says he faithfully performed his part of the said deed. And lastly, he says that the deed declared on of the 10th of

January, 1855, for the payment of the £240 and interest, is the same deed or mortgage, of which he does not give the slightest information of any kind, which he gave under the deed of the 9th of July, 1856; and because this is so, as he says, although it is manifestly untrue, he adds that it ought not to be enforced against him.

The fifth plea is sufficient. It states a release by the testator of the defendant by deed. This would have been sufficient without anything further; but the defendant has informed us that the consideration for the release was £210, paid before it was due in discharge of the £240, which does not invalidate the release.

The sixth plea, stating that before breach of the covenant he satisfied the plaintiff's claim by delivering to the testator goods which he accepted in satisfaction, is a bad plea; for accord and satisfaction before breach in covenant is no defence, according to all the authorities ancient and modern, as a deed can only be released or satisfied by deed.

I therefore think the second, third, and sixth pleas are insufficient, and that judgment should be given upon the same for the plaintiff; and that judgment should be given on the fifth plea for the defendant.

It is very proper to observe that these pleas, as they are drawn, exhibit apparently a very serious deficiency of the necessary professional and elementary knowledge of the law.

The defendant pleads that to secure the agreement in writing, which he refers to, the defendant was to execute a *mortgage or deed*. Now these are not equivalent or synonymous terms by any means, although the defendant does use them as equivalents in three or four different places.

Then he says this mortgage or deed was to be given as security for the certain fulfilment of *the said covenant of agreement*, whatever this may mean, but it certainly could be no covenant, as the agreement was not under seal.

Then he says this mortgage or deed was to be a *lien or encumbrance upon a certain title in law or deed of conveyance*, which is as senseless a collection of words as could readily be combined to mean nothing; while something, it must be presumed, even as a matter of pleading, was intended to be expressed.

If the pleas do not stand the scrutiny of the law, which is no reflection on the lawyer, they should at any rate be expressed in the language known either to the professional practitioner or to the layman ; but if this cannot be done by the gentleman who undertakes both in law and in fact to defend his client, he should, at any rate, seek for that professional assistance which he seems to stand so much in need of. (a)

Judgment for plaintiff on demurrer to the second, third, and sixth pleas; and for defendant on demurrer to the fifth plea.

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#### ADSHEAD V. UPTON AND HOLBORN.

*Rule for costs for not proceeding to trial—Rule of court No. 120—Practice.*

In ejectment against U. and H., after notice of trial given a summons was obtained to allow U. to defend as landlord in lieu of H., and an order to that effect was made on the commission day of the assizes, 13th of April. The plaintiff, in consequence, did not enter his record; and on the 27th, during the assizes, defendants' attorney (who had made no amendment as allowed by his order) took out a rule for costs of the day on the ordinary affidavit, that the plaintiff had not proceeded to trial pursuant to notice nor countermanded it.

*Held*, that such rule must be set aside with costs, for the plaintiff under the circumstances was not bound to go to trial in pursuance of his notice.

Per *McLean*, C. J.—Such rule was irregular; for as the judge at *nisi prius* might have allowed the record to be entered at any time during the assizes, there could be no default until they were over.

Per *McLean*, C. J., and *Wilson*, J., under rule of court No. 120, such rule may issue in vacation, at any time after the assizes for which notice was given.

Per *Hagarty*, J., *semble*, that the rule of court was not intended to allow such a rule to be obtained sooner than by the previous practice, but to give it either in the term following the assizes or in any *subsequent vacation*.

**EJECTMENT.**—After notice of trial was given in this case, the defendants' counsel moved in chambers, before the late Mr. Justice *Connor*, and obtained a summons calling on the

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(a) At the conclusion of this judgment *Richards*, Q. C., applied for leave to reply to the fifth plea on payment of a nominal sum for costs. *Read*, Q. C., for the defendant, remarked that the pleas were drawn in the country by a very young practitioner; but that, however defective they might be, the plaintiff was almost equally in fault for having demurred to part of the fifth plea, which he clearly had no right to do. The court allowed the plaintiff to withdraw his demurrer to the fifth plea and traverse it on payment of 5s. costs, and gave leave to the defendant to apply in chambers within a fortnight to amend the other pleas demurred to.

plaintiff, his attorney or agent, to shew cause why all further proceedings in this cause should not be stayed until the plaintiff should have given security for the payment of the defendants' costs, in case the plaintiff should discontinue, become nonsuit, or a verdict be found for the defendants; and why (without prejudice to that application) the defendants should not be allowed to amend the appearance and notice of title, by allowing the defendant Hannah Upton to defend as landlord, and in lieu of the defendant John Holborn; in the meantime further proceedings not to be stayed until that summons was disposed of.

That summons was obtained on the 10th of April, and on the 13th Mr. Justice *Connor*, on hearing the parties, made an order that the said summons, so far as the same related to the application of the defendants for security for costs, should be, and the same was thereby discharged with costs; and as to the remainder of the said summons, it was ordered that the defendant Hannah Upton be allowed to defend this action in her own name, and in lieu of the defendant John Holborn, and that the said defendant do pay to the plaintiff the costs of this application, and all costs occasioned by the said amendment.

The decision on the summons having been reserved by the learned judge before whom it was argued from Saturday, the 11th day of April, judgment was given thereon on Monday, the 13th day of April, being the commission or opening day of the assizes for York and Peel, at which assizes notice had been given for the trial of the said cause.

The plaintiff's attorney, in consequence of the change authorised to be made in the defence of the said action by the said order, did not enter the record with the deputy clerk of the crown, or clerk of assize, before noon on the commission day, (13th April,) as required by the 203rd and 205th sections of the Common Law Procedure Act. Defendants' attorney did not make the amendment, or act upon the order made, authorising the defendant Hannah Upton to defend in her own name as landlord, nor did he give any notice to the plaintiff that he abandoned or did not intend to act upon such order.

On the 27th of April, while the assizes were sitting, the defendants' attorney, without referring to the precise state of the case, made an affidavit that the plaintiff had given notice of trial for the assizes to be held at Toronto on the 13th day of April, and that the plaintiff did not proceed to the trial of the said action in pursuance of such notice, nor countermand the said notice of trial. Upon that affidavit an order was taken as of course, by which the attorneys of both parties were ordered to attend before the master, and that the master should examine the matter and tax the defendants' costs, for that the plaintiff had not proceeded to trial pursuant to his notice, which costs, when taxed, should be paid by the plaintiff, if it should appear to the master that costs ought to be paid.

On the service of that rule an application was made before the Chief Justice of the Court of Common Pleas, and a summons was granted, calling upon the defendants to attend the presiding judge in chambers on the first day after service thereof, at ten o'clock in the forenoon, to shew cause why the rule for costs of the day granted at side bar should not be set aside or rescinded, on various grounds therein stated, the first of which was that the said rule had been prematurely issued, the assizes, the not going down to which was complained of, not being over when the said rule was issued.

On the 2nd of May, on the return of that summons, and upon hearing the parties by their agents, the learned Chief Justice made an order that all proceedings on the rule issued for costs of the day should be stayed until the fourth day of the next term.

On the second day of the term, *Freeland*, for the plaintiff, obtained a rule calling upon the defendants to shew cause why the rule for costs of the day for not proceeding to trial, issued at side bar on the 27th day of April last, should not be set aside or rescinded for irregularity, with costs, on the grounds: 1. That the rule was issued in vacation and not in ordinary term. 2. That the said rule was issued before the assizes had terminated for which the notice of trial referred to in the said rule had been given. 3. That the said rule

had been issued on the common affidavit only, and without disclosing the whole of the facts, from which, if they had been disclosed, it would have appeared that this was not a proper case for giving to the defendants costs of the day for not proceeding, and that the same should not be taxed or allowed against the plaintiff for not proceeding to trial; or why the said rule should not be set aside or rescinded, with costs, upon the ground that the defendants having, on the commission day of the assizes for which notice of trial had been given, obtained an order for leave to amend their appearance in this cause, by allowing the defendant Hannah Upton to defend this action in lieu of the defendant James Holborn, the plaintiff could not, after the granting of the said order by a judge in chambers, have proceeded to trial upon the notice of trial as served; and because the defendants had not, at the time the said side-bar rule was issued, and have not yet amended their appearance, as by the said order they were permitted to do; and upon grounds disclosed in affidavits and papers filed; and all proceedings on the said rule were thereby stayed.

*F. Proudfoot* shewed case, contending that the plaintiff, not having entered his record for trial pursuant to the 203rd and 205th sections of the Common Law Procedure Act, and the assizes being considered only as one day, he was at liberty after default made in entering the record to move for costs of the day in vacation, under the 120th rule, adopted since the passing of the Common Law Procedure Act, which rule declares that "All rules which by the English practice may be had as a matter of course, upon signature of counsel at side bar, or are given by the master, clerk of the papers, or clerk of the rules in England, are to be given by the clerks of the Crown and Pleas, or their deputies, in the same manner, and the same may issue on any day in term or in vacation." He cited also *O'Neil v. Barnhart*, 5 O. S. 453.

*Freeland*, contra, cited *Sleeman v. Copper Miners' Co.*, 5 D. & L. 451; *Peebles v. Lottridge*, 19 U. C. R. 628; *Warne v. Hill*, 7 C. B. N. S. 726; *Morgan v. Fernyhough*, 11 Ex. 205.

McLEAN, C. J.—Assuming that this rule is undoubtedly included amongst the rules which by the English practice may be had as a matter of course upon signature of counsel at side bar, or are given by the master, clerk of the papers, or clerk of the rules in England; and that the rule in this case might issue in term or vacation, it by no means follows that it was properly obtained, or that it could properly issue at the time it was obtained.

To entitle defendant to the costs of the day, it was necessary that the plaintiff should have made default in bringing the cause to trial at the assizes for which the notice of trial was given. The notice of trial was for the assizes for the united counties of York and Peel, to be held at the city of Toronto, on the 13th day of April then next. The defendants' counsel contends that the cause not having been entered on that day amongst the records for trial, could not be tried during the sitting of the court, and that the plaintiff must be taken to have made default in the trial by reason of his having made default in entering the record.

He seems to have forgotten, however, that the judge at *nisi prius* may permit a record in any suit to be entered after noon of the commission day, if upon facts disclosed on affidavit, or on the consent of both parties, he sees fit to do so (C. L. P.<sup>1</sup>A. sec. 203). In this case the facts which the plaintiff could disclose on affidavit were such that there could scarcely be a doubt of any judge who might hear them allowing the record to be entered at any stage of the assizes, had the plaintiff been prepared to proceed in the case; but the delay which was occasioned by the defendants' applications, first for security for costs, and then for the defendant Mrs. Upton to be allowed to defend the cause alone as landlord, were such as not only to justify the course which the plaintiff took, but almost to compel him to abandon the trial of the cause during the last assizes.

Though the notice of trial was served on the 12th of March, no application for security for costs or to amend the appearance was made till the 10th of April; and when these were disposed of, and costs ordered to be paid by the defendant on both applications, the plaintiff was left in total

ignorance whether defendant intended to act on the order which had been made to amend or not. He had a right to suppose that the defendant intended to avail herself of that order; and he could not have made up the record and entered it as it originally stood without incurring the expense of making it up so as to correspond with the amendment at any time the defendant might capriciously require that to be done. Then there was no condition attached to the order to amend except the payment of costs; and the defendant might, if the record had been entered, have objected to go to trial in a case of Adshead against Upton and Holborn on the notice served, when the style of the cause had been changed to that of Adshead against Upton alone.

Besides all this, the change in the proceedings might change the position of the plaintiff so materially that he might not deem it expedient to bring the case to trial at all.

Independent of all these considerations, I think the plaintiff was entitled to bring the cause to trial, if there had been no obstacle in his way arising from the defendants' proceedings at any time during the assizes, and that he could not be considered in default till after the assizes had passed without the cause having been brought to trial. I think the order for the costs of the day was prematurely obtained while any time remained during which the plaintiff might have brought the cause to trial, and therefore that the order must be set aside with costs; but if there were no irregularity, I should feel it absolutely necessary to rescind the order on the merits, for the whole proceeding is one having the appearance of extremely sharp practice, in which the defendants' attorney has tried to gain an advantage by evading the payment of costs awarded against the defendant, and trying to throw the plaintiff into costs on a ground which was not sustainable.

Had the defendants' attorney waited till the assizes had actually been closed, and had then applied for the order for the costs of the day, I should be obliged to hold that, though in vacation, the proceeding is sanctioned by the 120th rule.

I do not know why a defendant should be delayed till the term after the assizes in taking a proceeding which the rule authorises to be taken in term or vacation. If entitled to costs, the vacation between the assizes and the following term is open for an application for such costs just as much as any other vacation or term, and on the objection that the order could not properly be obtained during vacation I think the defendants would be entitled to succeed.

I think the rule must be made absolute upon the merits, and that the plaintiff is entitled to have the same made absolute with costs, on the ground of irregularity.

WILSON, J., read the following judgment prepared by

HAGARTY, J.—I do not think that this is a case in which the defendant on the merits should have had costs of the day against the plaintiff.

Pending the assizes, and long before the first day of term, the side-bar rule was obtained for these costs.

Section 225 of the Common Law Procedure Act provides that “the rule for costs of the day for not proceeding to trial or assessment pursuant to notice, or not countermanding in sufficient time, may be drawn up on affidavit, without motion made in court.”

Rule No. 120 provides that “all rules which by English practice may be had at side bar,” &c., &c., are to be given by the clerks of the Crown and Pleas, or their deputies, in the same manner, *and the same may issue on any day in term or in vacation.*

I can find nothing in point as to the right to issue this rule in the vacation in which the assizes are held.

If called on to establish and regulate the practice as in a case of the first impression, I think, both on principle and analogy to other proceedings of a cognate nature, no such rule ought to issue till the term following the assizes, or vacation after such term.

Whether called side bar or by any other name, it is a rule of the court. When the court meets after the vacation in which the assizes are held, it would seem—on the ideas suggested by the old continuances, respiting of jurors from term

to term, and the *nisi prius* clause as to the anticipated coming of the Queen's justices before the day of respite—that all things done in vacation at the assizes, and all things that ought to have been done and were there omitted to be done, are, as it were, first made known to the court and certified by the return of the record at its first sittings in term.

A plaintiff gives a notice to try at the York and Peel assizes; he is in regular practice bound to enter his record on the first commission day, but we know he is, under special circumstances, allowed to enter it subsequently. Can it be in regular practice that on the second morning of the assize the defendant can obtain the side-bar rule of court, and proceed to tax his costs for the alleged default?

I hardly think that it was intended, either by the legislature or by our rule of court, to accelerate the defendant's time for taxing his costs, or to impose any earlier burden on a defaulting plaintiff. The practical effect of the change would reasonably seem to be, "The motion in open court is dispensed with. You may obtain the rule at side bar; and if you omit applying during the actual sittings in term, you may delay if you please, and issue it at any subsequent time in vacation."

I think we should not sanction the sweeping change in the practice suggested by the defendants. Such a course seems to me very inconvenient and unnecessarily hard on plaintiffs.

I think the rule should be absolute to rescind the side-bar rule, and all proceedings thereon, but, under the peculiar circumstances, without costs.

WILSON, J.—In this case the question is, whether the rule for costs of the day for not proceeding to trial pursuant to notice should be set aside because it was taken out in the same vacation in which the alleged default occurred, and *before the time*—that is, the ensuing term—when, according to the former practice, the rule could have been obtained.

I do not refer to the special facts of this case further than to say that I quite agree that the defendant should not, so far as they are concerned, maintain his rule,

because the plaintiff could not be presumed to be bound to proceed upon his former notice of trial, when a party was struck from or added to the record at the defendants' request, and more particularly until he knew whether the defendant intended to act upon the order which had been granted to him or not.

But as the point of practice is of general importance, it is deemed better to establish a rule for guidance in other cases, if possible, as it was with this view the learned Chief Justice referred the application to the full court.

The rule for costs of the day under the former practice was one which in this province required a motion to be made in term time by counsel. In England it required only counsel's signature, but no motion was actually made in court (Tidd Prac. 759, 9th ed.).

Many other rules also were issued at different times than in term time. The rule on the sheriff to return a writ was had as well in vacation as in term, on *præcipe* merely. The rule to make a submission a rule of court was had in vacation, upon a judge's fiat, and many others formerly, which are now unnecessary. The motion for a rule for judgment *nisi* against the casual ejector was signed by counsel, and was handed in during term, but no motion was actually made in court.

Side-bar rules are those which are said in England to have been moved by the attorneys at the side bar in court, but they were afterwards obtained of the clerk of the rules upon a *præcipe*.

The provision of the Common Law Procedure Act, which provides that a rule may be drawn up on affidavit, without motion made in court, is nothing more than adding the statutory sanction to that which was in fact the practice in England in this particular, although the practice was otherwise in this province.

In the second edition of Archbold's Practice, issued in 1826, the rule for costs for not proceeding to trial is put down among those rules which are granted as of course, and in which it is not necessary that counsel should actually make the motion *vivâ voce* in court, but upon signing the motion paper he handed it at once to the clerk of the rules.

This is the same practice which is laid down in the 6th edition of this practice, issued in 1838.

In Tidd's Practice, 9th edition, 759, it is stated in precisely the same manner.

Section 225 of our Common Law Procedure Act very nearly resembles section 99 of the English act.

But our rule, No. 120 of Trinity Term, 1856, differs a good deal from the English rule, No. 39, of Hilary Term, 1853.

The English rule is—"The costs of the day for not proceeding to trial or to execute a writ of inquiry may be obtained by a side-bar rule on the usual affidavit."

Our rule, which is copied from our earlier rule No. 6 of Michaelmas Term, 4 George IV., provides that "all rules which by the English practice may be had as a matter of course upon signature of counsel at side bar, or are given by the master, clerk of the papers, or clerk of the rules in England, are to be given by the clerks of the Crown and Pleas, or their deputies, in the same manner, and the same may issue on any day in term or in vacation."

I think the reference in this rule to rules which according to the English practice may be had as a matter of course *upon signature of counsel at side bar* is not strictly correct, as it does not appear there are any rules which issued on counsel's signature at side bar. Side-bar motions were made by the attorneys, and not by counsel nor upon counsel's signature.

In England, therefore, a rule for costs of the day for not proceeding to trial pursuant to notice, being a side-bar proceeding, and therefore a proceeding still *in court*, cannot be made until the ensuing term, but according to our rule it may (assuming the reference to counsel's signature can be respected) be issued *on any day in term or in vacation*.

I cannot, therefore, say that the defendant must wait until the term before he does move, nor can I hold that it would be irregular of him to take out his rule just the day before term, and unless I can do this I can place no restriction upon his taking out his rule on any day, even the very day next after the default has happened.

I do not see how his claim can be increased after the

default has once been committed by the plaintiff; for all the costs he is ever to get from the plaintiff have already accrued to him, and I see no positive reason why he should wait until the ensuing term before he is recouped the costs which the plaintiff has wrongly put him to. Our rule has modified the English practice in this respect, whether wisely or not, or intentionally or not, I need not say. It is sufficient that it is so in fact; and if it be found to be inconvenient, or it is likely to introduce too prompt a proceeding where not too much encouragement is needed, it may be advisable to alter it. The rule for costs of the day is perhaps of no great value in itself, as it does not grant to the party any costs, but merely submits his claim to the master to determine whether he is entitled to costs or not, and the discretion which the master may exercise is again subject to the direction of the court.

The rule for costs of the day, and all proceedings had under it, will however be discharged upon the merits shewn by the plaintiff.

Rule absolute, with costs.

### BEST V. BOICE.

#### *Goods sold and delivered—Want of privity.*

The plaintiff brought ejectment against D.; and hearing that D. was about to remove a barn upon the lot in dispute to certain other land which he had leased from defendant, he went to defendant and told him that it was his. D. afterwards took the barn there, though defendant forbade him; and the plaintiff then sued defendant for it as for goods sold and delivered.

*Held* that, even assuming the barn to be a chattel, he could not recover, for there was no contract or privity between them.

THIS was an action of assumpsit brought to recover the value of a barn which had been removed to lands of the plaintiff; and being on blocks raised from the ground and not attached to the freehold, the plaintiff sought to recover as for goods sold and delivered. The plea was never indebted.

At the trial before the late Mr. Justice *Connor*, then Queen's Counsel, holding the assizes at St. Thomas, in October, 1862, it appeared in evidence that a person of the name of Smith claimed half an acre of land, part of lot number four,

in the ninth concession of Bayham, on which there was a house or driving-house and barn in one building: that Smith being indebted to the plaintiff, turned the property over to him (as the witness expressed it) to be got back if he paid in three years. The patent for the whole lot had not then issued, but was to be obtained by one Barbridge, who was to make a title to the plaintiff for the half acre which Smith had turned over in payment or security for his debt. The patent was issued for the north half of lot number five, in the ninth concession of Bayham, in June, 1859, of which the half acre was part, and in December, 1860, Barbridge conveyed the half acre to the plaintiff, who said he had bought it from Smith and paid for it: that he had taken it for a bad debt. In 1857 Smith assigned his equity of redemption in the premises to one Dean, who in the fall of that year entered into possession, without interruption from the plaintiff, and remained there for some time, and finished the barn where it stood on the plaintiff's lot. Only the frame was up when Smith assigned to the plaintiff, and Dean after his purchase of Smith's equity of redemption finished it. One of the witnesses for the plaintiff described it as a framed barn, with planed sheeting, tolerably well finished, and about 30 x 40 feet in size. After ejecting Dean in 1860, the plaintiff with one of his witnesses, and the person from whom his title had been derived, hearing that defendant was about to purchase the barn from Dean, went to the defendant and told him the barn was his, and that he, defendant, should have nothing to do with it. Dean or his wife had previously rented a piece of land from the defendant; and on hearing the plaintiff claiming the barn defendant declared to him that he would not purchase, and that he would forbid Dean moving or putting it on his land. It was then partly removed from the plaintiff's land; and in about two weeks after the interview between plaintiff and defendant it was removed to the premises leased by Dean or his wife from the defendant, though the defendant had forbidden its removal to his ground.

Benjamin Dean, who had made the purchase of the equity of redemption, was sworn on the part of the defendant, and stated that he had paid Smith \$100 for his right, and had

laid out \$100 on the barn: that he was ejected in 1860 by the plaintiff, who refused to pay him anything for the barn, and that he had removed the barn before he was himself ejected. Another witness called for the plaintiff stated that when the barn was removed Dean was in possession of the piece of land and buildings, and lived in the house: that the posts were set in the ground, and the barn was laid upon them, and Dean removed the barn.

The jury found for the plaintiff and \$150 damages.

*Freeman*, Q. C., obtained a rule *nisi* for a new trial. He cited *Hill v. Perrott*, 3 Taunt. 274; *Russell v. Bell*, 10 M. & W. 340; *Brewer v. Sparrow*, 7 B. & C. 310; *Smith v. Hodson*, 4 T. R. 211; *Edmeads v. Newman*, 1 B. & C. 418; *Abbotts v. Barry*, 5 Moore, 98.

*Crombie* shewed cause.

McLEAN, C. J.—There is no testimony whatever that the defendant had ever purchased the barn, or had in any way interfered with it. On the contrary, it was shewn that defendant had expressly forbidden Dean to remove the building to the ground leased from him; and that after it was so removed contrary to the defendant's injunction, one Hayward rented it from Dean, and occupied from May, 1860, till the end of January, 1861, and that after that one Hilts had rented from Dean and was in possession up to the time of the trial. The jury gave a verdict for the plaintiff and \$150 damages, but the charge to the jury is not given. It may, however, be presumed to have been in favour of the plaintiff, as a certificate was given to entitle the plaintiff to costs. However that may have been, it is quite clear that in an action for goods sold and delivered the plaintiff cannot recover against the defendant on a supposed contract which never existed.

Admitting that the barn, supported from the ground by posts or blocks of wood, and not in any way attached to the freehold, must be regarded as chattel property, there is no testimony to connect defendant with it; and even if there were, the plaintiff could not recover as for goods sold and *delivered*. If Dean, who claimed an interest in the

barn, had sold to the defendant, the plaintiff might recover against Dean in an action for money had and received to his use, if he could establish his own right to the building, or he might recover in trover against defendant on the same testimony; but the defendant, not having in any way meddled with the building, cannot be held liable as for goods sold and delivered to him, when in fact there was no sale or delivery to him by the plaintiff or any one else.

The judgment must be set aside, which was entered for the plaintiff by some mistake, on payment of costs by the defendant, but the verdict for the plaintiff is so clearly against the justice of the case that it cannot be allowed to stand. A new trial will therefore be granted; and if any charge to the jury appeared on the notes of the trial in favour of the plaintiff, the new trial should be without costs, for misdirection, but as no such charge appears, all that can now be done is to grant a new trial with costs to abide the event.

WILSON, J., read the following judgment prepared by

HAGARTY, J.—In this case it was attempted to recover as for goods sold the value of a barn said to belong to the plaintiff, and which had been placed on defendant's land.

Viewing the case most favourably to the plaintiff, and the barn as personal chattels, (on which no question was raised,) I see nothing on the evidence from which the jury could have assumed a contract of purchase and sale of goods. The evidence points the other way. The defendant objected to its being placed on his land, and is not shewn even to have used it as his own.

Unfortunately there is no record of the learned judge's direction to the jury. I believe, however, that our deceased brother expressed his subsequent dissatisfaction with the finding.

As I find no legal evidence on the notes from which I think it possible to support the verdict, I think there must be a new trial.

WILSON, J.—I concur in the opinion expressed by his lordship the Chief Justice and my brother Hagarty.

New trial, costs to abide the event.

## REGINA V. ALLAN NEIL MCLEAN.

*Appeal from recorder's court—Practice.*

Defendant was convicted at the recorder's court of obstructing a highway on contradictory evidence, the result of the verdict being to shew that he and several others, whose houses and enclosures had been standing for sixty years, were encroaching upon the street. A new trial having been refused, on appeal only the evidence was returned to this court, with a copy of the rule *nisi*.

The court, under these circumstances, considering the importance of the case, and that the grounds of the judgment below were not given to them, directed a new trial, contrary to the usual rule, which was affirmed, that such appeals will not be entertained upon questions of evidence.

APPEAL from the Recorder's Court for the city of Kingston.

The defendant having been convicted of obstructing a highway in the city of Kingston by building thereon, in the July term following obtained a rule *nisi* for a new trial, which was discharged, and he thereupon appealed.

The papers returned to this court, and certified by the learned Recorder, contained only a copy of the indictment, the evidence, and the rule *nisi*.

The grounds of appeal were that the verdict was contrary to law and evidence and the weight of evidence, and that the evidence was insufficient to support such verdict.

*O'Reilly*, for the appellant.

*Read*, Q. C., for contra.

WILSON, J., delivered the judgment of the court.

This is an appeal from the Recorder's Court of the city of Kingston, from a conviction at that court for a nuisance in obstructing a highway, in which the learned Recorder discharged an application by the defendant for a new trial.

The indictment charges that the defendant, upon a certain portion of a public street or common and public highway in the city of Kingston, called originally Cross street, but now called Ordnance street, surveyed, allowed, and laid down in the survey of the city by the Crown surveyor, did unlawfully erect a certain house, buildings, fence, and erections, and permitted and suffered the same to be unlawfully erected, &c., on the said portion of public street, whereby, &c., to which defendant pleaded not guilty.

The question is, where the true original site or allowance of Cross street or Ordnance street is.

If it be where the Crown alleges it to be, and where the jury have found it to be, then the defendant and all the other owners and occupiers on the north side of Cross street, extending a considerable distance from Brewery street on the east to Montreal street on the west, and some of whom have had their houses and fences where they now stand for the last sixty years, have encroached upon the highway about forty-eight feet further south than the proper southerly line of the highway.

But if it be where the defendant alleges it to be, then the conviction is erroneous, and a new trial should be granted.

I think it right to say that this appeal has not been entertained because it is a mere conflict of evidence, and the question is upon and for which side it most preponderates; because this would be to assume a power which we can but very inadequately discharge, as compared to the greater advantages which the court where the actual trial has taken place, or is taking place, must necessarily possess over us in all cases where the weight and the just discrimination of evidence and of character are the chief objects of scrutiny and of inquiry.

But apart from all this, and from the very great importance of the cause itself, I have felt the utter want of the charge and direction of the learned recorder to the jury, and of his opinion upon and the grounds of his refusal of the new trial, to enable us to arrive at a definite conclusion whether or not justice has been properly rendered to the defendant; and I feel this the more particularly when we consider that the conviction, if maintained, is to disturb the dwellers along the whole line of street, and upon which, whatever others may have done, the defendant and those from whom he claims have erected a very valuable stone house and other buildings, and have maintained such occupancy undisturbed for the long period of sixty years.

It might be very difficult, too, even upon and as a question of evidence, to permit a verdict in such a case, to be attended with such consequences, to stand upon such evidence

as that given by Mr. Nash, the surveyor called on behalf of the Crown, that he "fixed the position of Ordnance street by measurement and reference to the plans, and not by any marks upon the ground except the fence at the north side of No. 265," when the ground ought to have been thoroughly and carefully searched before so violent a change was permitted to be made in the old received landmarks of the city; and when we compare this with the several very strong evidences upon the ground furnished by the defendant's witnesses, leading to a directly contrary conclusion to that which is furnished by Mr. Nash.

I see no evidence of this being more than an alleged legal nuisance, from which it is rather to be inferred that it is a private controversy carried on under the sanction of a public prosecution.

For these reasons I am of opinion that it is proper this case should again be submitted to the consideration of a jury.

The learned Chief Justice takes no part in this judgment in consequence of his relationship to the defendant; and my brother Hagarty has desired me to express very pointedly for him that he concurs in the new trial being granted solely because he has not had the benefit of the learned Recorder's charge to the jury and his opinion on discharging the rule for a new trial, and not because he has reviewed or balanced the evidence for or against the defendant; and that he wishes this to be understood, that the relief which is granted in this case may not be taken as a precedent that this court will entertain appeals in every case where the question is one of a conflict of evidence solely or properly, and fit therefore to be decided in the court below, but not the fit subject for an appeal to the superior court.

Appeal allowed.

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ASA WISMER v. DAVID WISMER THE YOUNGER, EXECUTOR  
OF DAVID WISMER THE ELDER.

*Promissory note—Pleading.*

To a declaration *by payee* against the maker of a promissory note, defendant pleaded that he made and the plaintiff received the note from him, and thence hitherto held the same, on certain terms and for a special purpose only, to wit, that the plaintiff should take care of it *for him*, and should not negotiate or part with it to any other person, and that there never was any value or consideration for the note except as aforesaid.

*Held*, on demurrer, a good defence.

DECLARATION against defendant, as executor of David Wismer the elder, on a note made by the testator on the 23rd of January, 1850, payable to the plaintiff, seven years after date, for £327, 15s.

*Third plea*, that the said David Wismer the elder made and delivered the said promissory note at the time in the declaration mentioned, and the said plaintiff then first received the same from the said David Wismer the elder, and thence hitherto held the same, on certain terms and for a special purpose only, to wit, that the plaintiff should take care of the said promissory note for the said David Wismer the elder, and should not negotiate it nor part with it to any other person; and that there never was at any time any value or consideration for the said David Wismer the elder making or paying the said promissory note, or for the said defendant paying the same except as aforesaid.

*Demurrer*, on the grounds that the said note is alleged and admitted to be made by the testator, and payable to the plaintiff, and therefore the testator could not deliver the same to the plaintiff to keep for him, as alleged in the said third plea; also, that the said third plea fails to shew in what respect there was no consideration for making the said note.

*Eccles*, Q. C., for the demurrer.

*Dalton*, contra, cited *Easton v. Pratchett*, 1 Cr. M. & R. 798; *Mills v. Oddy*, 2 Cr. M. & R. 103; *Bramah et al. v. Roberts et al.* 1 Bing. N. C. 469; *Abbott v. Hendricks*, 1 M. & G. 791.

MCLEAN, C. J.—The plea is certainly a very extraordinary one. At the argument of the demurrer I was very strongly impressed with the conviction that it could not be sustained. Further consideration, however, has induced me to doubt the correctness of that opinion. If the facts be as the defendant has stated them in the plea, and he can prove them at the trial, they afford a good defence to the action. The plaintiff can have no right to recover on a promissory note, though made in his favour, if the maker placed it in his hands merely for the purpose of being taken care of, and without any other consideration. It seems absurd that the maker of a note should place it in the hands of the payee for the sole purpose of being taken care of; and yet if it be true there is, however absurd such a thing may appear, a very good reason why the person entrusted with the care of the note for the maker should not recover for his own use a sum of money which, as a mere holder of the note for a special purpose, he is not entitled to recover.

The defendant alleges, after setting out the making of the note by the testator, and the delivery of it to the plaintiff for the purpose of being taken care of, that there was no other consideration for the making or payment of the said note *except as aforesaid*. The plea does not deny *all consideration* for the note; but after stating that it was made by the testator and delivered to the plaintiff for a special purpose—that is to say, to be taken care of for the testator—it further states that *except* for that purpose there was no other consideration for the making. The delivery of the note to the plaintiff for the sole purpose of being taken care of by him for the maker does not *appear* in fact to afford *any* consideration for the making; but it is not *impossible* that there may have been some object in making the note in favour of the plaintiff, and placing it in his hands to be taken care of, though if he had appointed the plaintiff to be executor of his will some object might more readily be imagined.

The reason for making the note and placing it to be taken care of in the payee's hands is very difficult to be discovered, but we cannot say that it is impossible there could have been

any reason. The note must *prima facie* be presumed to be for a good consideration. It contains an absolute promise to pay to the plaintiff a specific sum of money at a particular time, and unless the defendant's plea can be sustained the plaintiff must succeed. If the facts pleaded be true, however absurd they may appear, or however difficult to be accounted for, they afford a good ground of defence against the plaintiff's claim.

Under these circumstances, if the note was drawn from mere whim or caprice, and actually placed in the plaintiff's hands for the purpose of being taken care of, the plea affords a good answer to the declaration, and therefore must be held good. If it could be taken as a plea setting up want of consideration as a defence, it would be bad for not shewing particular facts from which the want of consideration must appear.

The cases cited on the argument of *Easton v. Pratchett*, (1 Cr. M. & R. 798,) *Stoughton v. Lord Kilmorey*, (2 Cr. M. & R. 72,) and *Forman v. Wright*, (4 Eng. Rep. 369,) *Low v. Chifney*, (1 Bing. N. C. 267,) and *Bramah v. Roberts*, (1 Bing. N. C. 469,) all shew that in an action on instruments importing consideration, it should not only be alleged in the plea that there was no consideration, but that the circumstances which shew that there was no consideration must be stated. In this case the allegation in the plea as to the making and delivery of the note to the plaintiff for a special purpose, if true, shews that there could be no valid consideration for the note moving from the plaintiff to the testator, and the plea that there never was any consideration for the making or paying the note *except as aforesaid*, puts in issue the fact whether the note was made and delivered to the plaintiff as stated.

Under all the circumstances, it appears to me the plea is good as a defence, and that the defendant must have judgment on demurrer; but the plaintiff should not be precluded from traversing the extraordinary facts set out as a reason why defendant in his character of executor should not pay the amount of the note. I think he should have leave to withdraw the demurrer, and take issue on the plea.

WILSON, J., read the following judgment prepared by

HAGARTY, J.—It appears clear that the plea demurred to would be bad if it stated merely that the note had been given without value or consideration.

In one of the early cases after the new rules, *Easton v. Pratchett*, (1 Cr. M. & R. 805,) Lord *Abinger* enters fully into the question. He says: "The plea of the special matter, which, according to the new rules, is now to be pleaded, is not to be confined to the effecting the same purpose as a mere notice to prove the consideration. The intention then of these new regulations being to give the plaintiff due notice of the real defence which is to be set up, would manifestly fail if such a general plea as the one in question could be sustained."

In that case the plea, without introducing affirmative matter, merely denied consideration. Issue was taken, and after verdict for defendant the court held it sufficient, though it would have been bad on demurrer. *Stoughton v. Lord Kilmorey*, (2 Cr. M. & R. 72,) is to the same effect.

In *Atkinson v. Davies*, (11 M. & W. 242,) *Parke*, B., discusses the same question: "Under the new pleading rules it is not enough to state that a note or bill was given *without consideration*, but the cause of the making or drawing must be stated affirmatively, as that it was made for the accommodation of another." In *Forman v. Wright*, (20 L. J. C. P. 148, 4 Eng. Rep. 369,) *Jervis*, C. J., says, "It is not sufficient in a plea alleging want of consideration to say only that there was no consideration, but the circumstances which shew that there was no consideration must be stated."

Assuming this to be undoubted law, we turn to the plea before us, and find defendant stating that his testator made the note and delivered it to the plaintiff; and the plaintiff received it on the special terms only that he should take care of it for testator, and should not negotiate or part with it to any other person, and it concludes with the usual denial as to value or consideration.

At the trial defendant, according to the authorities, would be certainly confined in his proof to the affirmative

matter as he pleaded it. I do not profess to understand why a man should make a note promising to pay money to another, and hand it to that other to safely keep for him, but it is perhaps not necessary that I should understand the reason for so doing. The more unlikely the act, the better chance for the plaintiff to urge to a jury against its existence. But if the fact be as pleaded, and a note be so made and given without value or consideration, I cannot say that it is not a good legal bar.

It is not impossible that the parties should so act. It is for the jury to determine whether they did so or not.

I think the defendant is entitled to our judgment.

WILSON, J.—The plea is framed, no doubt, upon the case of *Bramah v. Roberts*, (1 Bing. N. C. 469,) and is precisely like it in the special terms stated, excepting that in that case the acceptors pleaded that the payee indorsed the bill, and that the payee then delivered it to one Hunt on behalf of the acceptors, to keep and take care of it for the acceptors, and not for the purpose of being negotiated or delivered to any other person or persons whatsoever; while in this case it is that the maker delivered it to the payee to take care of for him, the maker, and not to part with or negotiate it to any other person or persons than the maker.

The plea then in *Bingham* alleged that Hunt delivered the bill to the plaintiff in fraud of the acceptors, and contrary to the special terms, and that the plaintiff when he took the bill from Hunt had notice of the terms on which Hunt held it.

This plea does not state in express terms any breach of the special terms; for it is apparent upon the record, if those facts be true, that the action which is brought by the payee is just as much against the conditions upon which he obtained and still holds the note as if he had fraudulently transferred it to another; but while as against that other it would have been necessary for the defendant to have shewn a breach of the special terms by direct allegation, it is not necessary he should do so against this payee himself under the circumstances stated.

The plea then is certainly sufficient; and being so in law,

it is of little consequence to inquire whether the special conditions are probable or even reasonable, although it is quite obvious that there may be many cases supposed in which a very proper and reasonable course would be pursued by pursuing just such a course as the parties have adopted here.

Judgment for defendant on demurrer.

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### THE BANK OF UPPER CANADA V. RUTTAN.

*Bill of exchange—Right to sue upon—Amendment disallowed.*

The plaintiffs declared against the acceptor on a bill as drawn in their favour; but which, when produced, was found to be payable "to the order of Thomas G. Ridout, Esq., cashier." It was endorsed, "Pay John Smart, Esq., cashier, or order. Thomas G. Ridout, cashier," but the name of Thomas G. Ridout had been struck out. At the trial the plaintiffs were allowed to amend by alleging that the bill was payable to the order of Ridout, who endorsed to Smart, and that they being the plaintiff's agents and cashiers received the bill for them, and as their property.

*Held*, 1. That the plaintiffs could not recover, for the beneficial interest which they were alleged to have in the bill would not entitle them to sue on it in their own name.

2. That the amendment should not have been allowed, as the effect of it was to make the declaration demurrable, and bad in arrest of judgment.

THIS was an action on a bill of exchange, drawn by S. Smith on and accepted by defendant, and alleged to be payable to the plaintiffs.

The pleas were *non accepit*, and payment.

At the trial, at Toronto, before *Morrison*, J., the bill was produced, and found to be payable "to the order of Thomas G. Ridout, Esq., cashier, at the bank of Toronto in Cobourg." It was endorsed "Pay John Smart, Esq., cashier, or order." Signed "Thomas G. Ridout, cashier;" but the name of Mr. Ridout was obliterated by a pen being drawn through it.

It was objected that the plaintiffs could not recover; that they did not appear to be the holders of the bill.

On the application of the plaintiffs' counsel the court allowed the declaration to be amended, so as to allege that the bill required defendant to pay "to the order of Thomas G. Ridout, Esq., cashier, or order, \$400, three months after date, and the said H. Ruttan accepted the same, and the said Thomas G. Ridout endorsed the same to John Smart, and the said Thomas

G. Ridout and John Smart were the cashiers and agents of the plaintiffs, and as such had and received the said bill as the property of the plaintiffs and for the plaintiff, and the same was then and still is the property of the plaintiffs." It was objected that this amendment rendered the declaration demurrable, and that no amendment could be allowed which could have such effect.

There was no evidence at the trial that the bill was the property of the bank, or that the same had been received by the cashiers as the officers and agents of the bank, except the fact that the bill was made payable to Thomas G. Ridout, Esquire, cashier, or order, and that the same was endorsed by him (with the designation of cashier attached to his name) to John Smart, Esquire, cashier, or his order, and by him endorsed to the agent of the bank of Toronto at Cobourg, or order.

A verdict having been rendered for the plaintiffs,

*C. S. Patterson* obtained a rule *nisi* for a new trial on the law and evidence, or to arrest the judgment. He cited *Mare v. Charles*, 5 E. & B. 978; *Martyn v. Williams*, 1 H. & N. 817; *Evans v. Cramlington*, Carth. 5, S. C. In Error, 2 Vent. 307; *Lindus v. Melrose*, 2 H. & N. 293, S. C. In Error, 3 H. & N. 177; *Price v. Taylor*, 5 H. & N. 540; *Pease v. Hirst*, 10 B. & C. 122; *Robertson v. Sheward*, 1 M. & Gr. 511; *Bawden v. Howell*, 3 M. & Gr. 638; *Lead-bitter v. Farrow*, 5 M. & S. 349; *McDowell v. Doyle*, 7 Ir. C. L. Rep. 598.

*McMichael* shewed cause.

McLEAN, C. J.—All the endorsements are thoroughly obliterated, so that the bill remains without endorsement, and the amendment which was allowed at the trial will not entitle the plaintiffs to recover on the bill. The acceptor or drawer cannot be called upon by any one but the party who appears on the face of the bill entitled to receive the money. The payee could not by virtue of his position as cashier give a right to sue upon the bill. His *name*, without such designation, endorsed in blank upon the bill, would

convey to any one who might be the holder a right to present it at the bank of Toronto at Cobourg, and if not paid when so presented would entitle him to sue for the amount.

The amendment of the declaration at the trial is in the allegation that the drawer required the said H. Ruttan to pay to the order of Thomas G. Ridout, Esquire, cashier, or order, four hundred dollars three months after date, and the said H. Ruttan accepted the same (then the following statements are interlined by way of amendment): "And the said Thomas G. Ridout endorsed the same to John Smart, and the said Thomas G. Ridout and John Smart were the cashiers and agents of the plaintiffs, and as such had and received the said bill as the property of the plaintiffs, and for the plaintiffs, and the same was then and still is the property of the plaintiffs."

This amendment only asserts that though the bill was made payable to Thomas G. Ridout, cashier, or order, the bill was not in fact his, but was the property of the plaintiffs, but it does not shew any right to sue in the name of the bank. The endorsement in blank by the cashier would have entitled the bank to sue as the holders of the bill, but without such endorsement the plaintiffs can only sue in the name of their cashier, and their being the beneficial holders can confer on them no right to sue in the names of any person but the payee or his endorser. Under these circumstances, I think the verdict in favour of the plaintiffs must be set aside, and the judgment arrested. The plaintiffs cannot have a judgment for an amount for which the law confers upon them no right to sue.

WILSON, J., read the following judgment prepared by

HAGARTY, J.—I am of opinion that the amendment rendered the declaration bad on demurrer, and also in arrest of judgment, and that there must be a new trial without costs.

All the authorities that I have met with go to shew that no stranger to a bill or note can maintain an action on it: that where, as in this case, the legal interest in the bill is either in Ridout or Smart, and the beneficial interest in the

plaintiffs as the true owners for whose use and on whose behalf the parties named received the bill as payees or endorsees, the right to sue at law is only with the latter.

The case in *Carthew* is cited by all the text writers as supporting that proposition. I refer to *Byles on Bills*, 6th ed. 114, 121; *Story on Notes*, 4th ed. secs. 125, 375. *Byles* says, p. 114, "If a bill be made payable to A. or order for the use of B., B. has but an equitable title, and the right of transfer is in A. alone."

The case in 7 Ir. C. L. Rep. 598 is clear on the point. There the note or bill was payable to James Sadleir, averred and proved to be the public officer of the Tipperary bank, whose property the instrument was. Sadleir never endorsed it. The plaintiff, his successor as public officer, sued as such. The court held the objection fatal on a review of the authorities.

I quite concur in that judgment.

I also refer to *Soares v. Glyn*, In Error, (8 Q. B. 25,) and to *Treuttel v. Barandon*, (8 Taunt. 100,) as incidentally bearing on the question.

WILSON, J.—Upon the argument Mr. Patterson, for the defendant, cited the case of *Martyn v. Williams*, (1 H. & N. 826,) to shew that an amendment ought not to have been made, because the pleading as amended was thereby rendered clearly demurrable.

If therefore the amended declaration could have been demurred to, or is open to arrest of judgment, it would appear from this authority, and from the case of *Bury v. Blogg*, (12 Q. B. 877,) that the amendment in question should not have been made.

The question then is, whether this declaration is now open to the objection taken to it in arrest of judgment; for if it be, the defendant ought to have the option of taking a new trial or having the judgment arrested, as he may deem the most suitable for him.

I will not recapitulate the authorities stated and commented on already. It is quite sufficient for me to say that I quite agree in the conclusion which has been expressed by

the other members of this court: that the allegation that the individual endorsements to Mr. Ridout and Mr. Smart, who were the cashiers and agents of the plaintiffs, and as such had and received the bill as the property of the plaintiffs and for the plaintiffs, and the same was then and still is the property of the plaintiffs, does not comport with the legal title apparent on the record, which would be clearly vested in Mr. Smart, the last endorsee, if his endorsation still stood, and which not by implication, but by positive averment, shews a title not only out of but never in the plaintiffs.

By the present consolidated act of the bank, 19 & 20 Vict., ch. 121, sec. 30, it is provided, in very nearly the same terms as in the original act of incorporation in 1819, that all bills or notes of the said bank signed by the president, vice-president, cashier, or other officer appointed by the directors of the said bank to sign the same, promising the payment of money to any person or persons, his or their order, or to the bearer, though not under the corporate seal of the said bank, shall be binding and obligatory upon it, in the like manner, and with the like force and effect as they would be upon any private person if issued by him in his private or natural capacity, and shall be assignable in like manner as if they were so issued by a private person in his natural capacity.

This and the continuation of the same section clearly applies to the ordinary bank-notes of the bank, but even as to them the statute requires that the bank (by their bills or notes) shall be the power or body which shall *promise payment*. The signature of the officers specified is merely for the purpose of authenticating them and giving them force. There is nothing therefore in the statute which can help the plaintiffs in this action.

I therefore think the rule should be absolute for a new trial, and for a disallowance of the amendment made at the trial without costs, or for arresting the judgment, if the defendant elect this course.(a)

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(a) Defendant elected to take the rule for a new trial without costs, and to disallow the amendment.

NELSON GRAY V. ALEXANDER BAN McMILLAN, ANGUS G.  
McMILLAN, AND DUNCAN McMILLAN.

*Dissolution of partnership—Agreement to pay debts of the firm—  
Construction of.*

The plaintiff and M. having been in partnership, on their dissolution M., with the two other defendants, agreed to pay the debts of the firm, and to relieve the plaintiff therefrom, in consideration of which the plaintiff assigned to defendants all accounts, &c., due to the firm. In an action against defendants for certain debts due by the firm, which the plaintiff alleged defendants had not paid, and for some of which the plaintiff had been sued, and judgment recovered.

*Held*, that the plaintiff had no right of action unless he had himself paid such debts.

THE plaintiff and the defendant Angus G. McMillan were copartners in business, as shopkeepers, in the township of Finch, from November, 1860, to the 14th day of September, 1861, during which period sundry liabilities were incurred, which remained unpaid on the day the copartnership was dissolved.

On that day the defendants, by agreement under seal, agreed and bound themselves jointly and severally "to pay the whole of the debts, accounts, and charges of every description, incurred and due, and owing by the firm of Gray and McMillan, from the date of the copartnership to the date of these presents, and shall free and relieve the said Nelson Gray, as an individual, and as a partner of the firm of Gray & McMillan, of all such debts, accounts, and charges of every description which can or may be brought against the said firm of Gray & McMillan."

The plaintiff, in consideration of being relieved from all liabilities as a partner of Gray & McMillan, assigned all his right and title to all book accounts, notes, obligations, goods unsold in the store, one span of horses and lumber waggon, double harness, and a pair of sleighs, and rigging belonging to them, sawed lumber, saw logs, and fifteen cords of cordwood, then lying at the ashery, to and in favour of the defendants, with power to them, in their own names, to sue for and obtain payment of all accounts, notes, and obligations, due and owing to the said firm of Gray & McMillan, and to grant discharges for the same.

The plaintiff, on declaring on this agreement, alleged that he had delivered up to defendants the property mentioned,

but that defendants had not paid the debts of the firm, nor relieved the plaintiff therefrom, but had left unpaid divers debts, to wit, &c., &c., (setting out various claims due to different persons named,) which debts they ought to have paid without delay after sealing said deed; and that the plaintiff still remained liable for each of such debts to the creditors.

At the trial, at Cornwall, before *Hagarty*, J., a verdict was taken for the plaintiff for \$1,376.46, being the amount of certain debts of the firm to certain creditors, which the plaintiff alleged the defendants had not paid. That verdict was taken subject to the opinion of the court, whether the plaintiff was not bound to pay the debts mentioned in the agreement between the parties before calling upon the defendants to pay them.

With the record was the following statement of facts, signed by the attorneys of the plaintiff and defendants:—

“The agreement was entered into. Plaintiff and his partner gave up all the property belonging to the firm of Gray & McMillan to defendants. Plaintiff has not paid any of the debts, but has been sued for some. Defendants have not paid any of those set out in the declaration, for some of which the plaintiff has been sued and judgment recovered. Plaintiff contends that defendants are bound by the agreement to pay the debts of Gray & McMillan as soon as the agreement was entered into, and the property in the plaintiff's hands given to them. Defendants deny this, and contend that they are only bound to pay so much of the debts as the plaintiff has actually been obliged to pay.”

*Brough*, Q. C., for the plaintiff, cited *Lethbridge v. Mytton*, 2 B. & Ad. 772; *Loosemore v. Radford*, 9 M. & W. 657; *Christie v. Borelly*, 7 C. B. N. S. 561; 1 Wms. Saund. 320 *a*.

*Stephen Richards*, Q. C., contra, cited *Young v. Taylor*, 8 Taunt. 315; *Taylor v. Young*, 3 B. & Al. 521; *Collinge v. Heywood*, 9 A. & E. 633; *Warwick v. Richardson*, 10 M. & W. 284; *Smith v. Howell*, 6 Ex. 730; *Smith v. Teer*, 21 U. C. R. 412.(a).

MCLEAN, C. J.—The object of the agreement on the part

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(a) This case was argued during the last term before *McLean*, C. J., and *Connor*, J.; *Hagarty*, J., being absent on account of indisposition.

of defendants was, in consideration of the dissolution of partnership and the assignment of the book-debts, notes, obligations, goods unsold, and certain other property specified, to relieve the plaintiff from the payment of any debts of the firm, and they bound themselves jointly and severally to pay the debts incurred, and due and owing by the firm of Gray & McMillan. It was not intended by that covenant to give to the plaintiff any right to call upon the defendants to pay to him all the debts which the firm owed to anybody else, in case they failed to pay such debts to the creditors of the firm.

The plaintiff, as a partner of the firm of Gray & McMillan, is as liable now as he was before the agreement to be sued by any creditor for a debt of the firm.

The defendants have become bound to pay these debts, and to relieve the plaintiff from such payment; but they are not bound to pay the plaintiff any of these debts unless the plaintiff has himself paid them, and then the amount can only be recovered in the shape of damages for a breach of their covenant as stated in the agreement. If the defendants do not perform their covenant, and the plaintiff sustains damage thereby, he may bring an action as often as damage is sustained, but he cannot compel the defendants to pay to him any debts which he has not paid himself, nor can he claim damages for not paying debts, except such damages as he has actually been put to in reference to such debts.

The statement referred to admits that the plaintiff has not paid any of the debts set out in the declaration, but has been sued for some; and defendants have not paid any of the debts set out in the declaration, for some of which the plaintiff has been sued and judgment recovered. If the defendants were now to pay all these debts, and so perform their covenant to free and relieve the plaintiff from the payment of all such debts, the plaintiff could only call upon the defendants to pay any damage which he had sustained before the payment of the moneys by the defendants. There is no ground for a verdict against the defendants for the amount of the debts alleged in the declaration to be still unpaid, for in that case the debts unpaid would become payable to the

plaintiff; and Angus G. McMillan, a partner of the firm of Gray & McMillan, would still remain liable to the creditors, and might be compelled to pay them the whole amount, in case the plaintiff became unable or neglected to pay.

Judgment for defendants.

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SYKES ET AL. V. THE BROCKVILLE AND OTTAWA RAILWAY COMPANY.

*Garnishment—Pleading.*

It is no defence to an action for a debt that attaching orders have been served upon defendant for the claim, or that he has been ordered to pay it over under the garnishment clauses of the C. L. P. A. There must be payment on such orders, or execution levied on defendant.

ACTION on an award made by Walter Shanly and Thomas Galt, arbitrators chosen by and between the parties to arbitrate and award as to certain matters in difference therein specified; whereby the said arbitrators, on the 22nd of February, 1859, did award that the Brockville and Ottawa Railway Company should pay to the plaintiffs, William Sykes and Charles DeBergue, the sum of £27,646 of lawful money of Canada, on the days and times and in manner following, that is to say, £9,216 on or before the first day of April then next, and the further sum of £9,215 on or before the first day of October then next, and the further sum of £9,215 on or before the first day of April, 1860, with interest on the said sums respectively from the date of the said award; the said sum of £27,646 being in full of all demands, as well with reference to an action on the contract for constructing the main line of railway of the said Brockville and Ottawa Railway Company, as with reference to the Merrickville branch, and all matters in difference between the parties. And the said arbitrators did further award that the costs of the cause referred to in the submission and the orders, including costs of preparing the submission, should be paid by the said Brockville and Ottawa Railway Company, together with one moiety of the arbitrators' charges forthwith, to be paid to the said William Sykes and Charles DeBergue, and that each party should pay their own costs of the reference; and further, that the arbitra-

tors' charges should be paid by the said William Sykes and Charles DeBergue. And they assessed the said arbitrators' charges on the said reference, and for preparing their award, at the sum of £320, so to be paid by the said William Sykes and Charles DeBergue, but one moiety thereof to be repaid by the said Brockville and Ottawa Railway Company.

The declaration then alleged that the said several days for the payment of the said several sums of money had elapsed long before the commencement of this suit; and although the plaintiffs had paid the sum of £320 for the purpose of taking up the said award, yet the defendants had not paid the several sums of money by the said award ordered to be paid, and the interest thereon, or any part thereof, nor had they paid the sum of £160, being the moiety of the said sum of £320 so paid by the plaintiffs as aforesaid, neither have they paid the said costs so as aforesaid by the said award ordered to be paid, amounting to a large sum of money, to wit, the sum of £40, or any part thereof.

The defendants did not deny the making of the award as set out, or their liability to pay the several sums thereby ordered to be paid; but they pleaded seven different pleas, setting out that various judgments had been recovered by the several parties therein named against the plaintiffs, and that the said parties had attached in the defendants' hands the several sums for which their respective judgments had been obtained; and they alleged in four of the pleas that they had been ordered by a judge in chambers to pay over the amounts so attached (specifying four cases in which such order had been made) in payment of the several judgments recovered by the said parties against the plaintiffs.

The plaintiffs signed interlocutory judgment for the amount of the balance claimed over and above the sum so pleaded to in the said several pleas; and they took issue on the said several pleas, and demurred thereto, on the ground that it was not stated in the said pleas that the defendants had paid any of the said attaching creditors, or that the respective amounts of their claims had been levied by execution against the defendants, nor was it stated in the third, fourth, or sixth pleas that the defendants were ordered to pay over the sums therein respectively mentioned.

*J. H. Cameron, Q. C., and Eccles, Q. C., for the demurrer.*

*Anderson, contra.*

The authorities cited are referred to in the judgments.

McLEAN, C. J.—By the 289th section of the Common Law Procedure Act it is enacted that service of an order that debts due or accruing due to the judgment-debtor shall be attached, or notice thereof to the garnishee in such manner as the judge directs, shall bind such debts in his hands.

Section 290.—“If the garnishee does not forthwith pay into court the amount due from him to the judgment debtor, or an amount equal to the judgment debt, and does not dispute the debt due or claimed to be due from him to the judgment-debtor; or if he does not appear upon summons, then the judge may order execution to issue, and it may be sued forth accordingly, without any previous writ or process, to levy the amount due from such garnishee towards satisfaction of the judgment debt.”

Section 297.—“Payment made by or execution levied upon the garnishee under any such proceeding as aforesaid shall be a valid discharge to him as against the judgment-debtor to the amount paid or levied, although the proceeding should be afterwards set aside or the judgment be reversed.”

In delivering judgment in the case of *Holmes et al. v. Tutton*, (5 E. & B. 75,) Lord *Campbell*, Chief Justice, referring to the Act 1 & 2 Vict., ch. 110, by which a sheriff under an execution is empowered to seize certain choses in action of the judgment debtor, remarks that the 12th section of that act contains machinery for suing the debtor in the name of the sheriff, on a note or other chose in action seized. “The enactment under consideration” (Common Law Procedure Act of 1854) “extends the power of executing the judgment to mere ordinary debts due to the judgment-debtor, though not secured by bill, note, bond, or other tangible security which is capable of being seized. It does not give an execution in terms, because it has recourse to a machinery, intended in general to be simple and expeditious,

by judge's order, instead of by seizure and sale or suit by the sheriff. It was necessary to fix some point of time after which the garnishee would be bound to notice the title of the judgment-creditor, and after which he could not safely pay his original creditor, being bound to pay the judgment-creditor; and by section 65," (the same as the 297th section of our Common Law Procedure Act,) "after payment or execution levied, (which must here mean, after the debt is realized by execution,) he is to be discharged as against his original creditor."

In a subsequent part of his judgment in the same case, p. 80, he says: "We construe the word 'bind' as not changing the property, or giving even an equitable property, either by way of mortgage or lien, but as putting the debt in the same situation as the goods when the writ was delivered to the sheriff. We take the word 'bind' to mean that the debtor, or those claiming under him, shall not have power to convey or do any act as against the right of the party in whose favour the debt is bound; and we construe it as not giving any property in the debt in the nature of a mortgage or lien, but a mere right to have the security enforced."

In a subsequent case, *Turner et al., assignees of Griffith, a bankrupt, v. Jones*, (1 H. & N. 878,) the case of *Richard Jones, judgment-creditor, v. Richard Griffith, judgment-debtor, Thomas Jones, garnishee*, was decided, and *Pollock*, Chief Baron, there said, "There must be judgment for the plaintiff. *Holmes v. Tutton* governs the present case. It was a decision after consideration by a court of co-ordinate jurisdiction, and therefore binding on us."

In the case of *Turner et al. v. Jones*, the Court of Exchequer held that the garnishee was not discharged without being served with a judge's order for the payment of money, and that by entering into an arrangement as to the payment of the debt after the service of the attaching order he will do so in his own wrong.

The service of an attaching order has the effect of *binding* the debt in the hands of the garnishee for the benefit of the judgment-creditor; and if he pursues the course authorised by the Common Law Procedure Act, and the debt be

undisputed, the attaching creditor may obtain execution, and levy his debt from the goods of the garnishee. In that case a garnishee will be justified in paying the debt which has been attached; but if the judgment-debtor does not pursue the remedy under the Common Law Procedure Act, the original creditor of the garnishee cannot be prevented from proceeding to have his debt established by judgment; for, as the late Mr. Justice *Burns* observes in his judgment, in the case of *McGinnis v. The Corporation of Yorkville*, (21 U. C. R. 172,) "It would be very absurd that a plaintiff should be prevented from recovering a debt of perhaps £1,000 because he happens to owe some one else £100, for which an attachment order has been served upon his debtor."

In this case the amount awarded to the plaintiffs against the defendants, including interest up to the fourth day of this term, appears to be £34,695, 13s. 9d.; while the several debts recovered against the plaintiffs, and attached in the hands of the defendants, amount only to £28,979, 0s. 2d., so that if the plaintiffs could not proceed for their whole debt they would be deprived of the difference, £5,716, 13s. 7d. The payment of the several sums attached, either into court or to the party who has obtained an order for their payment, will effectually relieve the defendants from all other proceedings in reference to the same demands. There need be no difficulty in paying to a judgment-creditor of the plaintiffs any amount which the defendants may owe the plaintiffs. Such payment will operate as a discharge of so much of the judgment creditors' demands against the plaintiffs; and it will, at the same time, discharge the defendants from so much of their own debt to the plaintiffs.

It is clear to me that the defendants are not discharged by anything set out in their pleas from the plaintiffs' demand, and that judgment must, therefore, be given against them on the demurrers. In the verdict a sum of £160 should have been included, as a moiety or half the charge of £320, being the expense of arbitration and award, and also a sum of £40 settled between the parties as the costs of the cause referred to in the submission and the orders, including costs of preparing the submission; and by consent these amounts will be added to the amount of the ver-

dict, together with interest on the whole amount from the period to which interest has been computed, at the rate of six per cent. per annum.

WILSON, J., read the following judgment prepared by

HAGARTY, J.—To this action, brought on an award, defendants plead in bar to certain specified portions of the claim, that attaching orders under the garnishment clauses of the Common Law Procedure Act have been duly served on them at the instance of the judgment-creditors of the plaintiffs, and in some of the pleas that such orders have been followed up by orders on them to pay over, without any averment of payment or execution levied.

I am of opinion that none of these pleas offer any legal bar.

The law, in my opinion, gives a defence to the garnishee as against his original creditor only in the event of his paying over on an order so to do, or on execution being levied on his property.

Section 297 of the Common Law Procedure Act enacts, "Payment made by or execution levied upon the garnishee," &c., "shall be a valid discharge to him as against the judgment-debtor to the amount payed or levied, although the proceeding should be afterwards set aside or the judgment reversed."

I have not read any English case where the point before us is expressly determined. But I gather from all the authorities as far as they go, from the words of the act, and from the reason of the thing, that it must be so.

In *Tilbury v. Brown*, (3 L. T. Rep. N. S. 380,) *Crompton*, J., says, "The garnishee is not discharged as against the judgment-debtor until 'payment made by or execution levied upon' him. Till payment or execution, therefore, it seems to me that the order" (there was both an attaching order and order to pay over) "is only a security for the debt within the meaning of the 184th section of 12 & 13 Vict., ch. 106," (Bankrupt Act,) "and is not such a lien as is protected by the exception in that section." This was after consulting the other judges, and he seemed to consider the case

within the principles laid down in *Holmes v. Tutton*, (5 E. & B. 65.)

In *Turner v. Jones*, (1 H. & N. 878,) the judges seemed of opinion, in the language of *Bramwell*, B., that "in order to discharge the garnishee, he must shew that he has done that which his obligation to the judgment-debtor required, and further, that the order of the court compelled him to do it." *Watson*, B.'s, language is still stronger.

In *Jauralde v. Parker*, (6 H. & N. 431,) *Pollock*, C. B., says, (speaking of the garnishment clauses,) "I am of opinion that the Legislature merely intended to place *debts* in the same position as other property which might be taken in execution."

Apart from authority, I cannot see with what justice a debtor can urge in bar of his creditor's right to obtain judgment against him for a settled or unsettled account, that a creditor of his creditor has obtained an order to have the debt paid to him. In many cases the proceeding to judgment can alone properly settle a disputed account. It cannot but be in many cases a most inconvenient way of adjusting the true balance by action against the garnishee. If the latter pay under the order so to do he is for ever protected; if his property be levied upon, he is to that extent also protected. In no other case can he in my judgment bar the original creditor's action, or suspend the right of the latter to proceed to judgment.

After judgment obtained, the court will, I think, have ample power to protect the garnishee, on proper application, from being placed in any danger of having to pay the same debt twice.

I also refer to *Blevins v. Madden*, (11 C. P. 198,) and the cases cited.

WILSON, J.—The pleas that attaching orders had been served, or that orders upon the defendants to pay had been made by a judge in favour of certain creditors of the now plaintiffs, it would appear constitute no defence in law to the right of the creditor to sue his own debtor for the debtor's actual indebtedness or liability to him, as nothing short of

payment made by or execution levied upon him, according to the 297th section of the act, will be a valid discharge to the debtor against his immediate creditor.

The garnishee or debtor, it is manifest, cannot safely pay his creditor while the attaching order or order to pay stands, of which he has been duly notified; but he can relieve himself from this double accountability to his own creditor and to the creditor of his creditor by paying the money into court which he owes to one of them.

If he do not do this, there can be no reason why he should not be made to do so, and the proceedings which are taken against him by his own creditor may be used practically for this purpose; for there can be little doubt that the debtor, having the power by statute to discharge himself by a payment into court, could apply at any time pending the suit, or even after judgment and execution, to stay all further proceedings against him at the suit of his creditor upon paying that money into court.

Or even if the money were levied under execution by the sheriff, the debtor might then apply to have the money paid into court for his benefit under the garnishment proceedings, and perhaps it would be his duty to do so for his own ulterior protection as against the original judgment-creditor.

While, therefore, the debtor or garnishee is and can be so fully indemnified in the manner provided by law, and according to the practice and power of the court, there can be no hardship imposed upon him by holding him liable to all the engagements which his own acts and the law of the land have cast upon him for the single purpose of enforcing payment once. A liability very analogous to that which he is under exists when he has given to a creditor several remedies against him for the same cause of action.

There are many decisions both in our own and in the English courts upon this question, many of which have already been cited.

Judgment for defendants on demurrer.

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## KELLY V. MOULDS.

*Lease—Covenant to repair—Plea, injury caused by plaintiff.*

Defendant, by a lease to him from the plaintiff, covenanted to repair, and that if he should fail the plaintiff might do it and sue for the sum expended. To an action on this covenant, for non-payment of money thus spent, defendant pleaded that the dilapidations so repaired were caused by the plaintiff wilfully, maliciously, and in the dead hour of the night, and the possession of the premises thus disturbed, contrary to the lease. *Held*, on demurrer, no defence, but the subject of a cross action only.

ACTION on a covenant contained in a lease from plaintiff to defendant of certain premises in the village of Oakville.

The defendant covenanted to keep the demised premises in good and sufficient repair during the term, (reasonable wear and tear and accidents by fire excepted,) and further, that the plaintiff or his agents, either alone or with workmen or others, should be at liberty from time to time, at reasonable hours in the daytime during the said term, to enter into and upon the demised premises to view and examine the state and condition thereof; and in case of any repairs being found necessary, the said defendant should and would from time to time cause the same to be well and sufficiently repaired, amended, and made good within one month next after notice in writing given to him, the defendant, or left at or upon the demised premises; and if the defendant should fail in making the necessary repairs in manner therein described, that the plaintiff or his agents might enter upon the premises and have the same repaired in a proper manner, and render the account for such repairs to the defendant, and demand payment of the same, and if default should be made in payment thereof the plaintiff should be at liberty to sue for the same in any court having jurisdiction over the same.

The plaintiff averred that he did enter into the premises to view the same, that various repairs were found necessary, and that due notice was given to the defendant thereof, but that defendant neglected to make such repairs within a month after such notice given to him; and that the plaintiff therefore entered upon the premises with workmen, and caused such repairs to be made: that an account of the cost thereof was rendered to the defendant, but he neglected to pay the amount, being the sum of \$49.91, which sum the said defendant hath not paid, nor any part thereof.

The plaintiff brought an action in the division court in the county of Halton, but the same was removed by writ of certiorari into the Court of Queen's Bench; and to the declaration filed the defendant pleaded that the dilapidations on the demised premises, and the injury to the doors, windows, and fences were done by the plaintiff, and by his procurement in and upon the said premises long before the said time when the said plaintiff entered to view and examine the said premises, and that such injury and damages were so done by the plaintiff wilfully and maliciously, and in the dead hour of the night, and the possession of the said premises disturbed thereby, contrary to the terms of the said lease; and so the defendant said he was not liable to pay for repairing the damages so done as aforesaid to the said premises.

To this plea the plaintiff demurred, on the grounds, 1. That the plea is no answer to the declaration, inasmuch as the declaration is upon a covenant to repair, and the plea endeavours to set up a trespass by the plaintiff as an answer thereto. 2. That the defendant must obtain redress by a cross-action for any trespass, even it be admitted that the plaintiff did what the plea states. 3. That the plea discloses no sufficient reason why the defendant should not pay the money claimed in the declaration.

*Sampson*, for the demurrer, cited *Morrison v. Chadwick*, 7 C. B. 266; *Newton v. Allin*, 1 Q. B. 518; *Wilkes v. Steele*, 14 U. C. R. 570; Sm. L. & T. 211.

*James Boulton*, contra, cited *Stevenson v. Lambard*, 2 East, 576; 1 Saund. 204, note 2; *Charlton v. King*, 4 T. R. 156.(a)

McLEAN, C. J.—The defendant does not deny the covenant on which the plaintiff's action is brought, but alleges a reason which cannot relieve him from the performance of it.

He alleges that the plaintiff wilfully and maliciously, and at the dead hour of night, committed a trespass which caused all the dilapidation and want of repairs of which the

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(a) Argued during last term before *McLean*, C. J., and *Connor*, J.; *Hagarty*, J., being absent on account of indisposition.

plaintiff complains, and so he says the defendant is not liable to pay for repairing the damages so done to the premises. Now in an action for the amount expended by the landlord in making the repairs, it cannot be a question how the dilapidations or want of repairs were occasioned. The defendant was bound to keep the premises in good and sufficient repair, and he admits in his plea that he did not do so, but he endeavours to excuse himself for his breach of covenant by alleging that the plaintiff *in the dead hour of night* entered and disturbed his possession, and caused all the dilapidations stated in his declaration. If the plaintiff was in fact guilty of the trespass which the defendant sets forth as an excuse for his breach of covenant, he is answerable for it in a separate action, but the covenant of the defendant cannot be discharged by such trespass.

One of the cases cited in the course of the argument is conclusive on that head, (*Newton v. Allin*, 1 Q. B. 519.) An action by a landlord against his tenant for breach of covenant to repair. The plea was, that after defendant had taken possession, and before breach, B. entered on a parcel of the demised premises and ejected defendant, and kept him out from thence hitherto, and committed certain grievances which were specified, whereby defendant lost all the benefit he should otherwise have had by his occupation, and that B. had full power and authority from the plaintiff so to act. The plea did not state, nor does the plea in this case, that the defendant had given up or quitted possession. To this plea the plaintiff replied *de injuria*, and the defendant demurred to the replication. The plea was held bad. Lord *Denman*, in delivering judgment, said, "The objections to the plea are insurmountable. The defendant could not at the same time exercise the rights of a tenant, and yet contend that he was not tenant." *Patteson, Williams*, and *Wightman*, J. J., concurred.

There is a case also in our own court, *Wilkes v. Steele*, (14 U. C. R. 570,) which strongly supports the same principle. This was an action of covenant for rent due on a mill leased by the plaintiff to the defendant. The plea was that the plaintiff permitted the dam and race to be out of

repair, contrary to his covenant in the lease contained, without this, that the plaintiff had performed the lease as alleged. *Held* no defence. The Chief Justice, in delivering judgment, said: "If failure on the plaintiff's part to comply with anything he covenanted to do would be a good defence in an action of covenant for the rent, which is what the defendant assumes, then there could be no such things as independent covenants in a lease, and the landlord would lose his whole rent for some trifling default on his part. The parties might come into those terms if they pleased, but it is not shewn that they did, and it certainly is not the law that when the landlord does not keep every covenant in his lease he cannot recover his rent."

Judgment for the plaintiff on demurrer.

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#### MYERS V. CURRIE.

*Slander—Evidence of character—Leave to appeal refused.*

*Held*, that in an action of slander evidence of the plaintiff's general bad character is inadmissible even in mitigation of damages. The verdict being for \$15, and such evidence urged only in mitigation, the court refused leave to appeal.

THIS was an action for slander, imputing theft.

*Plea*, Not guilty.

At the trial, at Sarnia, before *Richards*, J., defendant, in mitigation of damages, offered evidence of the plaintiff's general bad character previous to the speaking of the words. This the learned judge refused to receive, and the plaintiff had a verdict for \$15 damages.

*Robert A. Harrison* moved for a new trial for the rejection of this evidence, citing *Tay. Ev.* 2nd ed., pp. 314, 315; *Bell v. Parke*, 11 Ir. C. L. Rep. 413.

*Cur. Adv. Vult.*

HAGARTY, J.—The case of *Bracegirdle v. Bailey* (1 F. & F. 536) lays down the rule that evidence of the plaintiff's bad character is inadmissible. In the case cited from

the Irish Common Law Reports the point was not in any way *sub judice*, and the remarks upon it were therefore wholly extrajudicial.

We have consulted the judges of the other court, and find that their practice has been in accordance with the case of *Bracegirdle v. Bailey*. I think, therefore, the rule should be refused.

ADAM WILSON, J.—Clearly evidence of general bad character is inadmissible, though as to whether a reputation for the particular offence charged may be proved there have been different opinions expressed, more especially in text-writers.

Rule refused.

*Harrison* then applied for leave to appeal, urging that it should be granted, as the motion against the verdict was for misdirection, notwithstanding the small amount.

HAGARTY, J.—The evidence could at most only go in mitigation of damages, and it seems hardly worth while to allow an appeal in hopes of reducing the sum of \$15 to 1s. We will, however, consult the Chief Justice.

On a subsequent day the leave was refused.

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MEMORANDA.

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During this term the following gentlemen were called to the bar: HERBERT STONE McDONALD, EDWARD BOYD, CORYDON JOSEPHUS MATTICE, JAMES ANDREWS MILLER, JOHN DOWNEY, GILBERT JAMES WETENHALL, JOSEPH ALOYSIUS DONOVAN, JAMES SHAW SINCLAIR.

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In Easter vacation the Honourable ARCHIBALD McLEAN resigned his office of Chief Justice of Upper Canada, and was appointed Presiding Judge of the Court of Error and Appeal, in the room of the late Sir JOHN BEVERLEY ROBINSON, Baronet.

The Honourable WILLIAM HENRY DRAPER, C. B., Chief Justice of the Court of Common Pleas, was appointed Chief Justice of Upper Canada, in the room of the Honourable ARCHIBALD McLEAN.

The Honourable WILLIAM BUELL RICHARDS, one of the judges of the Court of Common Pleas, was appointed Chief Justice of that court in the room of the Honourable WILLIAM HENRY DRAPER, C. B.

The Honourable JOHN WILSON, one of her Majesty's counsel, was appointed one of the judges of the Court of Common Pleas.

The Honourable LEWIS WALLBRIDGE resigned his office of her Majesty's Solicitor-General.

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## TRINITY TERM, 27 VICTORIA, 1863.

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*Present :*

The Hon. WILLIAM HENRY DRAPER, C. B., C. J.

„ „ JOSEPH CURRAN MORRISON, J. (a)

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BENJAMIN GANTON, EXECUTOR OF STEPHEN GANTON THE ELDER, v. JOHN SIZE AND ANNE SIZE HIS WIFE, EXECUTRIX OF STEPHEN GANTON THE YOUNGER.

*Evidence—Entries against interest—Admissibility of.*

In an action by the executors of A., the father, against the executrix of B., the son, on an agreement said to be lost, to recover £300 alleged to have been lent by A. to B., the defence was that the money was a gift, on condition that the son should pay the father an annuity at the rate of four per cent. during his life. It was clearly proved that the £300 was advanced by A. to B., and that B. gave a note or writing of some kind for it; and it appeared that A., during his lifetime, had, in October, 1861, sued B.'s executrix for the money. B. died on the 15th of June, 1861. The plaintiff gave in evidence the following receipt, signed by A., dated April 28, 1861, which had been found among A.'s papers, waivered to a memorandum book kept by him :—

“Received from my son Stephen Ganton” (above referred to as B.) “the sum of forty-eight dollars for interest of 300 pounds at four per cent., due the 1st day of May next, according to agreement, which I cannot find, so I have put the receipt on this paper.”

There was no evidence to shew at what time this was made.

Defendant put in the following receipt, also signed by A., dated May 3, 1858 :—

“Received from my son Stephen Ganton the sum of twelve pounds, being one year's annuity due to me according to agreement bearing date May the first, 1858.”

*Held*, that the first-mentioned receipt was inadmissible for the plaintiff as an entry against interest; for though it admitted the receipt of \$48, yet it supported a claim for £300 by stating the existence and loss of the agreement, and describing the payment as interest instead of an annuity, as in the previous receipt; and the whole entry therefore was much more for the declarant's interest than against it.

THIS action was brought upon a special agreement in writing, said to be lost, to recover £300 for money alleged to have been lent by the plaintiff's testator, the father, to the defendants' testator, his son.

The defence was, that this sum was money given to the

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(a) The Honourable *Adam Wilson*, J., sat during the first three days of the term in this court, when he was transferred to the Common Pleas, and replaced by Mr. Justice *Morrison*. *Hagarty*, J., was absent during the term on leave. The judgments following delivered by Mr. Justice *Wilson*, on the first day of term, were in cases standing over from the previous term.

son, upon condition of his paying to his father an annuity at the rate of four per cent. interest upon the principal during the father's lifetime.

The claim was, that the principal while in the son's hands was to be at four per cent. interest, and liable to be recalled by the father during his life, but at all events was to be payable upon his death.

There was no dispute that the son received the money, nor as to the rate of interest which he was to pay for it. The only controversy was, whether the principal was a gift by the father to the son, upon the engagement of the son to pay this interest during his father's life; or, in other words, whether the money was given absolutely by the father to the son, in consideration of an annuity of £12 being paid by the son to the father so long as he lived, or whether it was a mere ordinary loan, in which the principal, as in other cases of loans, was to be repaid.

At the trial at Toronto, before *Morrison*, J., the jury found for the plaintiff, and £300 damages.

*McMichael*, for the defendants, obtained a rule calling upon the plaintiff to shew cause why the verdict should not be set aside, as being contrary to law and evidence, and for the reception of improper evidence,

To which *Robinson*, Q. C., and *Harman* shewed cause during last term, contending that the evidence was properly admitted; but even if it were not, that there was still sufficient evidence to maintain the finding for the plaintiff, and therefore it should not be interfered with, even although the court might determine that the writing objected to should not have been received in evidence.

The following authorities were cited: *Chambers v. Bernasconi*, 1 Cr. M. & R. 347, S. C. 4 Tyr. 531; *Higham v. Ridgway*, 10 East, 109, 122; *Davies v. Humphreys*, 6 M. & W. 153; *Inhabitants of Kingswood v. The Inhabitants of Birmingham*, 8 Jur. N. S. 37; *Gleadow v. Atkin*, 1 Cr. & M. 414; *Tay. Ev.* 554 *et sequ.*; *Searle v. Lord Barrington*, 2 Str. 826; *Percival v. Nanson*, 7 Ex. 1; *Burns v. Kerr*, 13 U. C. R. 468.

The facts of the case, as they appeared in evidence, are stated sufficiently in the judgment.

ADAM WILSON, J.—An annuity is defined as “a yearly payment of a certain sum of money granted to another in fee for life, or for years, charging the person of the grantor only,” (Co. Lit. 144 *b*; Cruise Dig. vol. i. p. 73;) and it is said to be “where the principal is gone for ever, and it is satisfied by periodical payments,” per *Best, J.*, in *Winter v. Mouseley*, (2 B. & Al. 802,) or, as *Tindal, C. J.*, describes it in *Marriage v. Marriage*, (1 C. B. 777,) “In the case of an annuity, the money advanced is irrecoverably gone; nothing is forthcoming to the grantee but the stipulated annual payments.”

The evidence that was given at the trial was to the following effect; and it was left fairly by the learned judge to the jury to say whether, upon all the facts, it was a loan upon which the principal was to be repaid, or a grant or gift of the money, upon the reservation of this annual payment or annuity, at the rate of four per cent. per annum, determinable upon the grantor's life. There is no objection to the *viva voce* testimony which was given. The objection that was made by the defendant was to the admission of an entry by the father, hereinafter mentioned:—

*James Tram* says, Stephen Ganton, Jr., told me he had to pay his father \$48 interest. He called it interest.

*John Dolby* says, Stephen Ganton, Sen., told me when I applied to him about a loan that he, Stephen, Sen., was not doing business himself: that *he intended putting some money in Stephen, Jr's, hands*, and perhaps I might get the loan I wanted from the son. Stephen, Jr., told me I must be punctual in the payment of my interest, as he, Stephen, Jr., had to pay his father the interest, *as it was only money lent to him*. He said *it would become his at his father's death*. He said he had to pay his father four percent interest.

*Thomas Ganton*, another son of Stephen, Sen., says, I had a money transaction with my father, so had Stephen a similar one in March, 1857. I told Stephen, Jr., I got £300 from my father, and gave him a note for it. I told Stephen that

father was going to give each of us £300 on the same terms. The reason why my father gave us the money was, he only received four per cent. from the bank; and as we were all responsible, we might as well have it at that rate, and make the best we could of it. Stephen, Jr., told me he got the £300 on the same terms I did. In January, 1858, I saw my note with the old man, and I saw the other two—Stephen's and the other. The notes were drawn in the old man's writing. Mine was dated, and set out that I had had £300, for which I was to pay four per cent. per annum, until the same was required or called for, or something to that effect, as near as I remember, and my father said they were all alike. Stephen died in the middle of June, 1861. Father told me the notes were lost. I gave a new note for mine, and I believe he called upon the others. This was in 1861, about a month after the death of Stephen. The new note was subsequently cancelled, and I have paid interest on it.

*Robert Croft*, for the defendant, speaks to the same effect on this part of the case.

*Thomas Barnett*, a grandson of Stephen, Sen., says, Stephen, Jun.'s, widow had no children by Stephen, and she married about nine months after the death of her husband.

*John Carter*—In 1857, Stephen, Jun., came to my place. He seemed in a good humour, and told me his father had brought him some money. I went over to the tavern with him, and found the old man there, writing in a little book, and he told me in Stephen's presence that, getting old, and having money in the bank, he was giving it to his sons at four per cent. Stephen, Jun., on another occasion said to Dolby that as his (Stephen's) father was very punctual about his interest, he (Dolby) must be punctual in his payments. Stephen's widow, after the husband's death, told me she would pay the interest at four per cent. as long as the old man lived.

*James Kellar*—Stephen, Jun.'s, widow called to pay the old man \$48, an annual payment, but he would not take it: he required the £300 from her. He said there was a suit going on. She asked how they owed it: he said he had given his son £300, and he wanted it back. She asked for a light-

coloured book, having a memorandum in it of a gift of the money: he said the memorandum must have been burned up with some old papers: he showed a book, with a receipt of a sum as an annuity: he said nothing about their owing it. The paper in the book was in the same terms as the receipt—not the wafered receipt or memorandum in the book produced, as it was written on a leaf, not wafered.

Besides this testimony, there were two receipts put in, the former by the plaintiff, the latter by the defendant.

The one put in by the plaintiff is wafered to a leaf in a small memorandum book, which belonged to the plaintiff's testator, and it is in the old man's handwriting. It is as follows:—

“Markham, April 28, 1861.

“Received from my son Stephen Ganton the sum of 48 dollars, for interest of 300 pounds, at four per cent., due the first day of May next, according to agreement, which I cannot find, so I have put the receipt on this paper.

“STEPHEN GANTON, Senior.”

The one put in by the defendants is on a separate piece of paper, and was also in the old man's handwriting. It is as follows:—

“Markham, the 3rd day of May, 1858.

“Received from my son Stephen Ganton the sum of twelve pounds, being one year's annuity due to me according to agreement bearing date May the first, 1858.

“STEPHEN GANTON, Senior.”

There were also two small memorandum books of the plaintiff's testator put in. In the one are attached to many of the leaves original instruments, chiefly promissory notes against different persons, amounting to nearly \$2,000, and in which the first of the above two receipts was also entered. In the other, containing a number of general memoranda, was the following entry:—

“1854.

October 6, gave Joseph Sanderson wife £50.

„ 20, gave John Thompson wife £50.

"1855.

May 11, gave Wm. Couch wife £50.

Oct. 6, gave Martin Wilkinson wife £50.

Nov. 20, gave Richard Couch wife £50.

"1856.

Jany. 1, gave Ambrose Barnet's wife, £50.(a)

Thomas note.....	£300
David do. ....	300
Stephen do. ....	300
Benjamin do. ....	300"

The objection of the defendants was to the reception of the entry above given at length of the 28th of April, 1861, in which the payment of \$48 is represented by the father as *interest*, which gives a peculiar significance, as the defendants say, to the transaction with respect to the £300, which makes it appear rather, if not altogether, as a loan, which is just the very point in issue in the suit, and which the defendants say it was the object and purpose, or at any rate the interest, of the father to establish. There is no doubt that it is expressed very differently from the one dated the 3rd of May, 1858, which describes the payment of a similar amount, twelve pounds, as "one year's *annuity*;" but this will not be of any special consequence if the document objected to ought properly to have been received in evidence, for it almost always happens that the testimony of this kind which is excepted to is excepted to just because it does contradict somebody or some other written testimony, or because it is in some way at variance with the case or assertion of the party opposed to it.

It is necessary, then, to determine whether this receipt which is attached to the book was admissible in evidence on the part of the plaintiffs.

The writing contains the following points, which require to be carefully observed:—

1st.—The time it bears date, the 28th of April, 1861.

2nd.—The statement that the \$48 are *for interest*.

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(a) These were the five married daughters of Stephen Ganton, Sen.

3rd.—The declaration that the interest is due upon an agreement, which the writer says, “I cannot find.”

1stly.—Was there any purpose which the father had in making the entry at this particular time? Was it in truth made at this time?

The son died on the 15th of June, 1861. The widow of the son intermarried with Size, the present defendant, within a few months, it is said, after her first husband's death, and the father commenced an action against her in October of the same year, before her marriage, for the recovery of the £300, but was nonsuited.

I see nothing suspicious *in the time of making the entry*, if it were really made at the time of its date; for in the son's lifetime there seems to have been no reason to suppose that the father meant to recall, or to try to recall, the money from him more than from his other children.

But what evidence is there that this acknowledgment of payment was made at the time of its date?

John Ganton says at the old man's desire he searched among the old man's papers for a writing or agreement between the old man and his son Stephen. The object of the search was to find a memorandum upon which a suit was then pending between the old man and the defendants. This search was in 1862. He found two books, one with a paper wafered in it. The books were produced at the trial. The writing in these books, as well as the memorandum attached, is in the old man's handwriting. The plaintiff and Mary Ganton were present.

Mary Ganton says the old man died at her husband's house in August, 1862. The executor removed all the papers after the old man's death on the Friday after: was present when Ganton searched.

James Tram says, in October (1862, as I understand it, and after the old man's death) he searched in the house where the old man had lived: (although it appears from Mary Ganton's evidence all the papers had long before then been moved away:) that he found in a tin box several papers, and the books produced, just as they are: he identifies the book: the books were in the old man's handwriting, so is the paper wafered in.

Thomas Ganton says his father told him the notes were lost: he, Thomas, gave a new note for his, and he believes his father called upon the others. This, he says, was in 1861, about a month after the death of Stephen.

There is not the slightest evidence that it was made at that time. No one saw it. There is no entry before it or after it, or any other writing or memorandum to assign to it the particular date it bears. The inference from all the extrinsic evidence is rather against it than for it, for no one even heard of the loss of the notes till after Stephen's death.

So far, then, this document is not very strongly vouched for as good original evidence.

2ndly.—Was there any purpose or object which the father had in describing the \$48 as *interest*, rather than as an *annuity*?

The word *annuity*, as well among professional persons as others, conveys in fact, as it does in law, a different idea from what *interest* does, although the word *interest* does not necessarily exclude it from being an annuity, for the annuity may consist of and be the interest, as it usually is, at some particular rate of the capital sum upon which it is computed.

I think, then, it was to the father's advantage, and very far from being against it, to represent this payment as interest rather than as an annuity.

3rdly.—Was the declaration that the father *could not find* the agreement upon which the payment was made to the interest of the party making it or against his interest?

It seems manifestly to have been made not only directly for his interest, but to have been made for the express purpose of its being a memorial, and to be used instead of the original, which could not be found; for by it the writer of it also preserves a memorandum of the amount of the capital, and the rate at which it was given; in fact, he makes the best substitution he could make for the missing original, short of getting another original for it from Stephen, as he afterwards did from his son Thomas.

It is very true there is abundant testimony that the sum which was given to his son was £300, and that the rate to

be paid for it was four per cent. per annum, and that the son did give his father a note or a writing of some kind for it. None of these matters are disputed; but still, if the original were lost or destroyed, it was to the interest of the father to have some evidence even of these facts; but it was more particularly to his advantage, if he ever desired to have the money treated as a loan, that he should describe the payment as *interest*, and more especially at his advanced time of life, when the capital as a loan was of great value, and the capital for an annuity was of very little, if of any value.

I am inclined, then, to think this acknowledgment was not made under such circumstances as to render it admissible in evidence for the plaintiff.

The case of *Higham v. Ridgway* (reported in 10 East, 109, and commented upon in Smith's leading cases) is the principal one which determines the grounds upon which such evidence is admissible or inadmissible, and to which all the late decisions claim to conform.

The facts of that case are that a recovery was suffered on the 15th of April, 1789, by William Fowden, the younger. Error was brought to reverse the recovery, because Wm. Fowden had appeared by attorney when he was an infant under the age of twenty-one years. It was alleged in support of the error that he was born on the 22nd of April, 1768, and it was alleged against this that he was born on the 2nd of that month.

The question then was, whether he was born before or after twenty-one years, reckoning backward, from the 15th of April, 1789, the day when the recovery was suffered.

A witness proved that he was sent by Fowden's father for Mr. Hewitt, the man midwife, and on that evening Mrs. Fowden was delivered of a son; that a Mrs. Fellows was also delivered on the same day.

Another witness proved the birth of young Fowden on a Friday, (the particular day of the week being proved by reference to a market day, and other collateral circumstances,) and that he saw Hewitt at Fowden's house.

Young Fellows also proved that he and young Fowden used to dispute about their age, but they were both born on

the same day, and he had been told this by young Fowden's father and mother, and his own birthday was the 22nd of April.

The son of Hewitt, the man midwife, was then called, who proved his father's death twenty years before, and he produced his father's books, in which his father, in his own handwriting, had been used to make regular entries of all matters relating to his business, with their dates, immediately on his return home. These entries were objected to, but they were received, the point being reserved.

The entries shewed young Fellows' birth and young Fowden's birth upon the same day, the 22nd of April, 1768, and to the entry relating to Fowden's birth was marked, "paid 25th October, 1768, £2, 1s. 1d."

The court, on full argument, held this entry admissible to prove the precise day of the birth of William Fowden, the son, because, as Mr. Justice *Bayley* says, "This was no officious entry made by one who had no concern in the transaction; he had no interest in making it; . . . and the principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact which is against his interest, it is clearly evidence after his death, and that principle has constantly been acted upon in the case of receivers' accounts."

*Percival v. Nanson* (7 Ex. 1) is to the same effect. *Parke, B.*, expressly supports Mr. Justice *Bayley's* language. In this last case entries of a deceased receiver charging himself with the receipt of rent from a sub-receiver, due from certain persons, (of whom the sub-receiver was one,) are held receivable in evidence, not only against the sub-receiver, but against the person for whom he said he paid the rent, "upon the principle that receipts are evidence, not only of the fact of payment, but also of the account on which it was made;" or, as *Pollock, C. B.*, says, "If the entry is admitted as being against the interest of the party making it, it carries with it the whole statement; but if the entry is merely an act done in the course of a man's duty, then it is confined to matters within that duty," which explains the case

of *Davies v. Humphreys*, (6 M. & W. 153,) cited by Mr. Robinson.

In *Gleadow v. Atkin* (3 Tyr. 289, 1 Cr. & M. 414, S. C.) the obligee had signed an indorsement on the bond of the defendant, his obligor, stating that the money in the bond was not the obligee's own money, but was trust money under the will of the late Cuthbert Thew, to be placed out by himself and the obligor; and it was held, as *Bayley*, B., said, "There could be no doubt upon the testimony of the witnesses that the indorsement was put upon the bond at the same time, or very shortly after the making of the bond;" and as that learned Baron also observed, "This indorsement must be at all times against the interest of the obligee;" and the rule in *Higham v. Ridgway* is repeated, "That the declarations of a person who, having peculiar means of knowing a particular fact, makes them against his own interest, are, after his death, admissible in evidence."

Now, testing the case in hand by the facts and law of these cases just cited, can it be said that this memorandum was admissible because it was against the maker's interest?

It was made after the loss of the original agreement, and apparently because of its loss; and it was made, even according to the date, a very short time before the maker of it brought an action to enforce payment. It contains an admission to the extent of £12 against the maker; but it contains also an admission of £300 directly in his favour, so that it is by mere pecuniary computation twenty-five times more in his favour than it is against him; and to say that this is an admission against interest is to read the authorities to which we have been referred backward, for nothing can be more unlike the entry of forty years' standing made by so disinterested a party as was the case in *Higham v. Ridgway*, or more unlike the entry of nearly thirty years so completely against the maker's interest as was the case in *Gleadow v. Atkin*, than this memorandum made by the person who only could be directly benefited by it, and made so very shortly before litigation did take place upon it.

I cannot say that this verdict would have been or ought to have been the same as it is, although it might have been

if this writing had not been laid before the jury. In *Quilter v. Jorss* (11 Weekly Reporter, 888, C. B.) Mr. Justice *Byles* says, "I think that where evidence has been improperly received, however little it may have influenced the verdict, yet if it did at all, a new trial should be granted;" and, therefore, I think there should be a new trial, without costs; but because there is to be another trial I forbear making any other comments upon the evidence than I have been obliged to make, which might affect either party on taking the cause again to trial.

I may add that the late Chief Justice of this court, who heard this case argued, concurs in the judgment just delivered. Mr. Justice *Hagarty*, so far as I am aware, had formed no opinion in the matter.

Rule absolute.

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## MARTIN V. CROW.

*Descriptions of land—Construction of—Rear boundary of first concession of Chatham—Lands granted before survey.*

The question upon the following facts was as to the depth of lot 20 in the first concession of Chatham, whether it extended 58 or 66½ chains back from the river Thames—the plaintiff, who owned it, contending for the latter boundary.

In 1792 this lot was described for patent to Edward Watson as commencing at a post on the river, on the limit between 19 and 20, and running thence north 67½ chains, more or less, to another post, &c., containing 200 acres, more or less. No patent ever issued on this description, and no trace of the post referred to could be found.

In 1803 a patent issued to Hugh Holmes for lot 20 in the 2nd concession, adjoining this lot to the north, described as “commencing at the south-east angle of the said tract, being the north-east angle of lands granted to Edward Watson;” and after giving the northern and western courses, “then south 45° east 66 chains 30 links, more or less, to the rear boundary of lands granted to the said Edward Watson; then along the said boundary to the place of beginning,” containing 200 acres, more or less.

In 1804 a patent issued to James McGarvin for lot 20, in the first concession, described as “commencing in front on the river Thames, at the south-east angle of the said lot, then north 45° west 58 chains, more or less, to within one chain of the lands granted to Hugh Holmes,” &c.

The only survey of which there was any evidence was in 1809, a plan of which shewed a road between the first and second concessions, 58 chains from the river. This had never been opened, but a blazed line was said to exist on the ground corresponding to it.

Several other patents for lots in the same concession had been also issued before 1809, among them one for the adjoining lot 19, in 1802, which was described as running back 68 chains from the river, and then going easterly to lot 20. Fifty-eight chains in depth would give to lot 20 only 153 acres.

Defendant claimed through Holmes. The plaintiff claimed through McGarvin, by a chain of title commencing with a deed from the sheriff in 1811, under an execution against McGarvin, of lot 20, in the first concession, containing 200 acres, more or less, giving no metes or bounds, and ending with a conveyance to the plaintiff in 1843, in which the lot was described as containing 200 acres of land, “bounded in front by the river Thames, in the rear by the allowance for road between the first and second concessions, on one side by lot No. 19, and on the other side by lot No. 21.”

*Held*, 1. That the grant to McGarvin carried the lot back 66½ chains, for,

1. That the patent to Holmes, on which that to McGarvin depended, was not avoided by the reference to Watson's land as *granted* when no patent had issued, the land described to him being clearly intended; that Holmes' grant clearly could include nothing contained in the description to Watson; and that McGarvin was entitled to go back to within one chain of Holmes', the distance of 58 chains being given as approximate only.
2. That as several lots had been granted by numbers and concessions before 1809, the presumption was that some general survey had been previously made; and that, as this was not shewn to have been done away with, the conveyance to the plaintiff, though after 1809, might be held to refer to it, and not to the concession laid out in that year, which would have confined him to 58 chains.

And that the plaintiff was therefore entitled to succeed.

THIS was an action of trespass *quare clausum fregit*, on the following land: “Commencing on the limits between lots

Nos. 19 and 20, in the first concession of the township of Chatham, in the county of Kent, at the distance of 55 chains from the river Thames; thence north fifty-five degrees west twelve chains fifty links; thence parallel with the river Thames eleven chains; thence south forty-five degrees west eleven chains to the place of beginning, in the said township of Chatham, in the county of Kent."

The defendant pleaded not guilty: that the property was not the property of the plaintiff; and *Liberum tenementum*.

The land was claimed by the plaintiff as part of lot No. 20, in the first or front concession on the river Thames, in the township of Chatham, and by the defendant as part of lot No. 20 in the second concession, the dispute being as to the depth of the range of lots fronting on the river.

At the trial, at Chatham, in November, 1861, before the late Sir *J. B. Robinson*, Chief Justice of Upper Canada, a verdict was taken for the plaintiff for ten dollars damages, subject to the opinion of the court.

The plaintiff put in a copy certified by the assistant commissioner of Crown Lands, and dated "Crown Land Department, Quebec, Sept. 4, 1860," of the following description:—

"Edward Watson, lot No. 20, in front, Chatham, County of Kent, Western District,

Commencing at a post on the river Thames, in the limit between lots Nos. 19 and 20; then north forty-five degrees west sixty-seven chains and a-half, more or less, to another post; then parallel to the general course of the front, easterly, 30 chains, more or less, to lot No. 21; thence south 45 degrees east 67 chains and a-half, to the river Thames; and then westerly along the water's edge, with the stream, to the place of beginning, containing 200 acres, more or less.

(Signed) D. W. SMITH.

With Ld. Board certificate. 22 August, 1792.

No. 7244."

In the margin of this description was the following memorandum: "On the 18th August, 1804, the secretary certified that no deed had been completed to Edward Watson for the lot."

This was objected to by defendant as not being evidence. No patent in fact ever issued to Edward Watson.

A certified copy of a patent to Hugh Holmes was also put in, dated the 13th of May, 1803, of lot No. 20, in the second concession of the township of Chatham, described as follows: "All that parcel or tract of land situate in the township of Chatham, in the county of Kent, in the Western District, in our said province, containing by admeasurement two hundred acres, be the same more or less, being No. 20, in the second concession of the township of Chatham, together with all the woods and waters thereon lying and being under the reservations, limitations, and conditions hereinafter expressed; which said 200 acres are butted and bounded, or may be otherwise known as follows: that is to say, commencing at the south-east angle of the said tract, being the north-east angle of lands granted to Edward Watson; then north forty-five degrees west sixty-six chains thirty links, more or less, to the allowance for road in rear of said lot; then south forty-five degrees west thirty chains twenty-six links; then south forty-five degrees east sixty-six chains thirty links, more or less, to the rear boundary of lands granted to the said Edward Watson; then along the said boundary to the place of beginning."

This was the patent under which defendant claimed.

Also a patent, dated the 28th of August, 1804, to James McGarvin, for lot No. 20, in the first concession of the said township, described as follows: "All that parcel or tract of land situate in the township of Chatham, in the county of Kent, in the Western District, in our said province, containing by admeasurement two hundred acres, be the same more or less, being lot No. 20 in the front or first concession of the said township of Chatham, together with all the woods and waters thereon lying and being, under the reservations, limitations, and conditions hereinafter expressed, which said 200 acres of land are butted and bounded or may be otherwise known as follows: that is to say, commencing in front, upon the river Thames, at the north-east angle of the said lot; then north forty-five degrees west fifty-eight chains, more or less, to within one chain of the lands granted to Hugh Holmes; then south forty-five degrees west thirty chains, more or less, to the limit be-

tween lots Nos. 20 and 19; then south forty-five degrees east to the river Thames; then along the water's edge, following the several courses of the said river, against the stream, to the place of beginning."

This was the patent under which the plaintiff claimed.

Several patents were also put in for other lots in the first concession to aid in construing the grants in question. The descriptions given in these grants will be found stated in the judgments.

The plaintiff then put in the following deeds, shewing a chain of title to him from the last-mentioned patentee, James McGarvin:—

1. From William Hands, sheriff of the Western District, to William Everitt the younger, dated the 25th of October, 1811, upon a sale under execution against the lands of James McGarvin, of "all that certain parcel or tract of land situate, lying and being in the township of Chatham aforesaid, in the county of Kent aforesaid, being lot No. 20, in the first concession of the said township of Chatham, in the county and district aforesaid, containing by admeasurement two hundred acres, be the same more or less."

2. From William Everitt the younger to James Woods, dated the 10th June, 1817, with the same description.

3. James Woods to Thomas Martin, dated the 24th of April, 1818, of "all that certain parcel or tract of land situate, lying and being in the township of Chatham, in the county of Kent, in the Western District of the province of Upper Canada aforesaid, being known and described as lot No. 20, in the front or first concession of the said township of Chatham, containing by admeasurement two hundred acres of land, be the same more or less, with the dwelling-house and other buildings thereon erected, and all fences, rails, and stakes thereon erected, standing or being, which said two hundred acres of land are butted and bounded as follows, that is to say, in front by the river Thames, in rear by the allowance for road between the first and second concessions, on one side by lot No. 19, and on the other side by lot No. 21."

4. From Thomas Martin, senior, to Thomas Martin, junior

(the plaintiff,) dated the 28th of January, 1843, with the same description as in the last deed.

It was then proved, and afterwards admitted on both sides, that the only survey of which there was evidence on the land was the Survey of Thomas Smith in 1809, a plan of which from the Crown Land Office was filed. Evidence was given of the existence of a blazed line corresponding with the line shewn in the plan between the first and second concessions, south of the land in dispute, and at a distance of 58 chains from the river Thames, thus agreeing with the depth given in McGarvin's patent. No road, however, had ever been opened there.

It appeared also that allowing 58 chains depth to the plaintiff's lot, as contended for by the defendant, would give only 153 acres to his lot instead of 200. It was admitted that no trace could be found of a post planted at 67 chains and a-half from the front, as mentioned in the description to Watson.

In consequence of various judicial changes this case was four times argued.—1. In Hilary Term, 1862, before *Robinson*, C. J., and *Burns*, J.; 2. In Trinity Term, 1862, before *McLean*, C. J., *Burns*, J., and *Hagarty*, J.; 3. In Hilary Term, 1863, before *McLean*, C. J., and *Connor*, J.; and, 4. In Easter Term, 1863, before *Hagarty*, J., and *Adam Wilson*, J.

*C. Robinson*, Q. C., for the plaintiff, *Albert Prince* for defendant.

The following authorities were referred to: *Doe. Campbell v. Crooks*, 9 U. C. R. 638; *Clark v. Bonnycastle*, 3 O. S. 528; *Jamieson v. McCollum*, 18 U. C. R. 445; *Mahony v. Campbell*, 15 U. C. R. 396; *Keeley v. Harrigan*, 3 C. P. 173; 59 Geo. III., ch. 7, sec. 12; *Doe. Bell v. Orr*, 5 O. S. 436; *Horne v. Munro*, 7 C. P. 433.

ADAM WILSON, J., read the following judgment prepared by

MCLEAN, C. J.—The plaintiff charges the defendant with trespass on lot No. 20 in front, on the river Thames, in

the township of Chatham. The defendant denies any trespass on the plaintiff's lot; and at the trial the question was, whether the alleged trespass was on lot No. 20 in the first or No. 20 in the second concession of Chatham, the latter lot belonging to the defendant and the former to the plaintiff.

The plaintiff's lot was drawn by one Edward Watson, in whose behalf a description was made out in the Surveyor-General's office, for the purpose of a patent being completed in August, 1792, but no patent was ever completed in his name. The patent was subsequently completed in the name of James McGarvin, bearing date 28th August, 1804.

The description to Edward Watson gives the lot  $67\frac{1}{2}$  chains from the water's edge of the river Thames. The deed to McGarvin only gives 58 chains; and the defendant being the owner of the lot of the same number immediately in rear, insists that the plaintiff cannot claim further back than the 58 chains specified in the patent, notwithstanding the original intention to make the lot  $67\frac{1}{2}$  chains long.

It is necessary, in order to decide that question, to examine the patent under which the defendant claims, and it will appear that the several patents do not in any respect clash, and that they embrace distinct parcels of land, McGarvin's boundaries being carefully stated to run 58 chains, more or less, to *within one chain* of the land granted to Hugh Holmes, the defendant's lot. Then the patent to Hugh Holmes, which had issued on the 13th of May, 1803, commences at the south-east angle of the lot, being the north-east angle of lands granted to Edward Watson; and in the description, after stating the distances and courses, it is stated as running from the rear south 45 degrees east 66 chains 30 links, more or less, to the rear boundary of lands *granted to the said Edward Watson, and then along the said boundary to the place of beginning.*

It is evident that Hugh Holmes, or those claiming under him, could not, under the patent to him, assert any right to any part of lands granted to Edward Watson, and I think it is equally clear that the lot alluded to as granted to Edward Watson is the one now claimed and occupied by the plaintiff. Hugh Holmes' lot is described as commencing at

the south-east angle, being the north-east angle of lands granted to Edward Watson. It is true that, though Watson was the original nominee of No. 20 in front on the river Thames, no grant was ever completed to him, and the description is so far wrong as it states the lot to have been *granted* to Edward Watson; but that term was not used in its strictly legal sense, but as describing the lot by which Hugh Holmes' lot was intended to be bounded in front.

In the description made out for Edward Watson, the lot appears to have been held by him in 1792 under land board certificate, as most lands then occupied were held, there being but little time elapsed after the division of the province of Quebec, during which patents could have been obtained; and by the 20th section of 31 Geo. III., ch. 31, under which that division was effected, the several persons holding lands for their own use in freehold, in fief, or in roture, or by certificate derived under the authority of the Governor and Council of the province of Quebec, of the yearly value of forty shillings sterling, were entitled to vote for the election of members of the House of Assembly. A lot of land so held was in fact considered as granted whenever any name was entered upon it; and in the 59 Geo. III., ch. 7, it is evident that the Legislature acted upon that construction; for by the 12th section of that act the Surveyor-General is directed to furnish to the treasurer of each district a list or schedule of all the lots in each town, township, or reputed township, as the same are designated by numbers and concessions, or otherwise, upon the original plan, in which list it was required to be specified opposite to each lot to whom such lot, or any and what part thereof, has been described as granted by His Majesty, and whether the same or any part thereof was *yet ungranted*. In construing the act, the Surveyor-General was bound to consider every lot or part of a lot as granted upon which any person's name was entered, and only those lots *ungranted* to which no name was attached, without stopping to inquire by what authority the entry was made.

It is, I think, abundantly evident that lot No. 20, in front on the river Thames, in the township of Chatham, was laid

out  $67\frac{1}{2}$  chains in length, though in 1804 the length was reduced to 58 chains; but in the former case the length was absolute in extent, and in the latter 58 chains, more or less, to lands granted to Hugh Holmes, or within one chain of that lot.

Then as to the adjoining lot, No. 19, for which a patent issued to John Drake, in May, 1802, it is described as extending back from the river 68 chains, "then parallel to the general course of the river Thames easterly 30 chains, more or less, to lot No. 20." This latter part of the description, I think, shews that lot No. 20 was supposed to run as far back as No. 19; for it was expected that the rear line of No. 19 run easterly, parallel to the river, would strike No. 20, and that the side lines of No. 19 would be of equal length.

No. 18, with the land in front on the river Thames, is described in the patent to John Drake, of the 27th February, 1807, as running from the river Thames north 45 degrees west 86 chains.

No. 17 is described in the patent to John Wheatons, of the 27th May, 1797, as commencing on the river Thames, at the south-east angle of lot No. 16, "thence extending back from the front, in the direction of north 45 degrees west, the distance of 68 chains; thence parallel to the river Thames, on a course north 45 degrees east 30 chains; then south 45 degrees east 30 chains; then south 45 degrees east 68 chains, to the river Thames; thence south-westerly, along the bank of said river, to the place of beginning."

No. 16, on the river Thames, is described in the patent to Christopher Arnold, of the 15th December, 1803, as running north 45 degrees west from the river 72 chains.

It is not shewn upon what plan the lots in front of Chatham were described, or whether it was intended that they should be of such length that the rear should be on one straight line. From their being of different lengths that may be presumed, but it is not shewn by any plan, nor is there any evidence on the subject. No line is shewn on the ground, and it is admitted that no line was run between the first and second concessions before 1809, when the township was surveyed by Mr. Smith.

The patents for No. 20 in front, and for No. 20 in the second concession, were both completed before any survey appears to have been made; and though the latter is first in point of date, it appears to have been very carefully drawn so as not to interfere with the lot in front then known as Edward Watson's. From the circumstance of the adjoining lot and all the other lots west having a depth of at least 68 chains, I think it must be presumed that No. 20 was to have the depth of 67 chains and 50 links, according to the location by Edward Watson; and the patent to McGarvin states the depth to be 58 chains, more or less, to within one chain of the lands granted to Hugh Holmes, which therefore entitles him to claim all the land between that and the river.

I think the verdict rendered for the plaintiff cannot properly be disturbed.

ADAM WILSON, J.—The patent to Hugh Holmes, dated the 13th of May, 1803, under which the defendant claims No. 20 in the second concession, it is very clear can cover no part of the land described in the land board certificate of the 22nd of August, 1792, in favour of James Watson, because the front line of 20 in the second is positively expressed to be the rear boundary of 20 in the first, and 20 in the first concession is to be ascertained by the description given of it, as before mentioned, in the land board certificate. Now that description is very plainly given. The point of commencement is at a point on the Thames, between lots 19 and 20; then from such post the course is north 45 degrees west 67 chains 50 links, more or less, to a post; then parallel to the general course of the front, easterly, 30 chains, more or less, to lot No. 21; then giving the other courses, and concluding, "containing 200 acres, more or less."

The patent which issued on the 28th of August, 1804, of this lot, and after the one for the lot in the second concession, does not help the matter, for it grants the land from the Thames northerly 58 chains, more or less, to within one chain of the lands before then granted to Hugh Holmes;

but as Hugh Holmes' land begins at the rear of Watson's, it is manifestly just the same question whether we consider all these instruments separately, or either the first or third, or both of them, with the second. It will be more convenient, then, to consider the question as arising upon the descriptions contained in the land board certificate of 1792, confirmed afterwards by the patent of 1804, and in the patent of 1803.

The distance northerly from the river Thames in the first description is described to be 67 chains 50 links, not positively but more or less, to a post; while in the patent of the same land it is described to be 58 chains *more or less*, to within one chain of the lands granted to Hugh Holmes. If there had really been such a post on the ground as that alluded to in the certificate, such post would be the terminating point, whatever the distance that point might be from the river; but it is said there was no such post in fact, nor at that time ever had been, and therefore the subsequent description of 58 chains in the patent, more or less, to Hugh Holmes' land, should rather be accepted as the true extent of the line, as that corresponds very nearly with the survey which was made in 1809, and which has governed ever since then.

But against this it may be said that what the Crown no doubt proposed to grant, according to the custom and practice of grants in this province, was a lot of 200 acres at least, and while 67 chains 50 links by 30 chains would a little overrun the allowance, a lot of 58 chains by 30 chains would fall very far short of it; and the mere fact of no post having been upon the ground at that early day, 1792, or of no survey into lots having been actually made, is perhaps an additional reason why greater effect should be given to the actual distance named of 67 chains 50 links; for unless that distance be adopted, there will be no other limit to this particular measurement, upon which all the others depend, and the proposed grant, as well as the one of 1803 to Hugh Holmes, upon which the defendant claims title, would be wholly defeated.

In order that the distances may govern, many other

descriptions of adjacent lands in the first concession are produced, containing the same length of northerly course from the frontage on the Thames as that which is given for this lot :—

Lot No. 17, granted on the 27th of May, 1797, to John Wheatons, 68 chains.

Lot No. 19, granted on the 17th of May, 1802, to John Drake, 68 chains.

Lot No. 16, granted on the 15th of December 1803, to Christopher Arnold, is described as running northerly from the Thames 72 chains.

Lot No. 18, with the broken land in front, granted on the 27th of February, 1807, to John Drake, 86 chains.

I do not lay any stress whatever upon the fact that No. 20 was not granted to Watson at the time when the grant was made to Hugh Holmes of the lot in the second concession ; for the representation in Holmes's grant, that his land begins "at the north-east angle of the lands granted to Edward Watson," is not to be construed with the rigidity that the subject or a part of the subject of this grant itself would or might have to be governed by.

This is no parcel of the grant ; it is a mark or index to determine the place of beginning of that which is granted ; the precise and literal correctness of the description of this particular spot is of no consequence so long as the spot itself is sufficiently indicated.

It is very certain the Crown knew the application of this word *grant* to Watson's land in the patent which was issued to Holmes, and knew that that which was set apart for or intended to be granted to Watson was considered substantially as a grant.

The grant in effect had been made. Watson was permitted to enter upon and enjoy the land, and to sell it, and it became subject in the course of devolution to the same laws which governed property actually granted. Nothing was wanting to perfect the grant but the formal or ceremonial part of the transaction.

After the appropriation of the land to Watson in the Crown Lands Department, that department carried out prac-

tically the doctrine which prevails in equity in matters of contract, that that which is agreed to be done is to be considered as having been done; and it would be claiming quite too much to require that we should hold that this word *grant*, used objectively only in Hugh Holmes' grant, shall be allowed to have no other operation than as a grant under the great seal of the province, and the sign manual of the governor, and that too for the very purpose of defeating the grant to Hugh Holmes himself; for if this construction prevail, the patent to Hugh Holmes is void for uncertainty; and Hugh Holmes, and all who have been claiming under him from that time, including the defendant, have been and are trespassers, a position which the defendant has no wish to place himself in, even for the sake of defeating the plaintiff; but it is quite as well he should not have it in his power either to prejudice himself or the plaintiff upon this objection.

But it is said, if this verbal exception do not prevail, that after a survey was in fact made of this part of the country in 1809, and the concession line was then laid out between the land in the first and second concessions, that although grants or conveyances which were made before this time may stand, that all grants and conveyances which have been made since such survey must be held to be and to have been made with reference to such survey; so that although lot No. 20 in the first concession, as it was before the year 1809, may be held in all conveyances made before that time to be still lot No. 20 in the first concession as the first concession then was, yet all conveyances made since that survey, which runs through a part of lot No. 20, and not at the rear of it, must be held in describing lot No. 20 in the first concession to mean lot No. 20 in the new survey made in 1809, and only that portion of No. 20 which lies in the first concession according to that survey, and not to include the rest of lot No. 20, which, although in the first concession before the year 1809, is not in the first concession according to the survey made in that year. And therefore it is contended that, although the patentee of No. 20 in the first concession may take 67 chains 50 links back from the river, because his patent is dated in 1804,

and the first concession line was really there at that time, yet that this plaintiff cannot by a conveyance of lot No. 20 in the first concession claim all the land which the patentee held, because he has acquired his title since the year 1809, and the first concession since 1809 is not where it was before that time; and that he must therefore be held to have bought only what is now in the first concession of 1809, and the residue of the lot must still be vested in the person antecedent to him who may properly have restricted the limits of his grant.

McGarvin, the patentee, in 1804, got the land as before described. The sheriff of the Western District in 1811, under an execution against McGarvin's lands, sold lot No. 20 in the first concession of Chatham to Wm. Everitt in fee. Wm. Everitt in 1817 sold to James Woods lot No. 20 in the first concession.

James Woods, in 1818, sells to Thomas Martin the said land, bounded as follows: "In front by the Thames, in rear by the allowance for road between the first and second concessions, on one side by lot 19, on the other side by lot 21."

Thomas Martin, sen., in 1843, sells to Thomas Martin, jun., the said land; and giving the general boundaries of the lot as in the preceding deed from James Woods, so that according to this argument the sheriff in 1811 did not really sell all McGarvin's land which he had obtained by grant in 1804 as No. 20 in the first concession, but only so much of it as lay within the first concession according to the survey of 1809, leaving still to McGarvin and to his heirs from that day to this the residue of this lot, probably unknown to him or them, and quite unexpected to any one else.

It is admitted, for the purpose of this branch of the argument, that this whole lot was known as No. 20 in the first concession before 1809; but it is contended that since 1809 no "first concession" simply, without some special addition, can in law be permitted to include or apply to any other land whatever excepting to that which may be in the *first concession* by the survey of 1809: that this latter survey

has given such a new and exclusive character to the lands surveyed, that it has obliterated all other means of description or identification than that which it has laid down.

The survey of 1809 it is admitted is the original survey that was made of this land; but some general ground survey must have been made at a very early day to enable such descriptions to have been given of the lands that were described for grant or actually granted before that date, for it is described in many patents years before that time as regularly divided and known by lots and concessions, and the presumption is in favour of such a division having been made in some authentic form as there represented.

If a survey be legally established, as, for instance, if an old survey be legally done away with and a new one substituted for it, I have no doubt that all subsequent conveyances must be construed according to, and be regulated by, the new survey. A lot described generally as such a lot, or as in such a concession, or in such a township, must mean such a lot, or such a concession, or such a township, according to the new survey, or survey in force when the conveyance is made, the same as Michaelmas was held to be new Michaelmas, although the parties contracted with a view to old Michaelmas, (*Doe dem. Spicer v. Lea*, 11 East, 312;) and as Martinmas was on the same principle held to mean new Martinmas, (*Smith v. Walton*, 8 Bing. 235.) But there is no evidence here that the first or presumed survey before 1809 was wholly done away with, so that it no longer existed for any purpose, and that a new and only authorised survey was established in its stead, to govern in every case without exception or limitation.

I cannot say as a matter of law from the facts submitted that a conveyance may not have relation to the concession as described in the original grant, and therefore I am of opinion the verdict should be entered for the plaintiff.

Judgment for the plaintiff.

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## THE QUEEN V. JERRETT, MYERS, AND FOSTER.

*Criminal law—Evidence—Right to contradict witness.*

Four prisoners being indicted together for robbery, one severed in his challenges from the other three, who were first tried. *Held*, that he was a competent witness on their behalf.

A witness called for the Crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel. He admitted such statement when shewn to him, but said it was all untrue, and made to save himself.

*Per Adam Wilson, J.*—The prosecutor's counsel was properly admitted to disprove the witness' assertion as to how this statement came to be made, for the fact of its being obtained as he stated would tend very much to prejudice the prosecution, and was therefore not a collateral matter, but relevant.

*Hagarty, J.*, inclined to the opinion that the witness having fully admitted his previous inconsistent statement, no further evidence relating to it should have been received.

AT the assizes, at Toronto, in October, 1862, before *Morrison, J.*, these three prisoners were indicted with one David Abbey; for that they, on the 25th day of June, 1862, in and upon one Michael Healy, in the peace of God and our Lady the Queen then being, feloniously did make an assault; and him, the said Michael Healy, in bodily fear and danger of his life, then feloniously did put, and the moneys of the said Michael Healy, to the amount of £155, and one pocket-book and one belt of the goods and chattels of the said Michael Healy, from the person and against the will of the said Michael Healy then feloniously and violently together did steal, take, and carry away, and that the said William Jerrett, William Myers, David Abbey, and Richard Foster, at the time of their so robbing the said Michael Healy as aforesaid, him, the said Michael Healy, feloniously did strike and beat.

The prisoners having all pleaded not guilty, David Abbey severed in his challenges from the other three, whom the Crown elected to try first. Abbey was offered as a witness on their behalf; and being objected to on the part of the Crown as incompetent, was rejected by the learned judge.

In the course of the trial a question was also raised as to how far a witness could be contradicted by other testimony, who, being called for the Crown, admitted that he had made a former statement in writing quite different from his evidence, but said that it was made to save himself. The

facts on which this point arose are fully stated in the judgment of Mr. Justice *Wilson*.

The three prisoners having been convicted, *McMichael*, in Michaelmas Term last, obtained a rule *nisi* for a new trial, for the reception of improper evidence, and the rejection of evidence.

*Gwynne*, Q. C., shewed cause during Easter Term, and cited *Rex v. Oldroyd*, Russ. and Ry. 88; *Wright v. Beckett*, 1 Moo. & Rob. 414; *Dunn v. Aslett*, 2 Moo. & Rob. 122; *Holdsworth v. The Mayor, &c.*, of Dartmouth, 2 Moo. & Rob. 153; *Regina v. Williams*, 6 Cox C. C. 343; *Rex v. Ryan et al.*, Jebb Ir. C. C., 3 British Crown Cases, 5; *Stark Ev.* 4th ed. 128, note; *Rosc. Crim. Ev.* 3rd ed. 1846, 153, 183; *Tay. Ev.* vol. ii. sec. 1217; *Hawkesworth v. Showler*, 12 M. & W. 46.

*McMichael* supported the rule, and cited *Regina v. Carpenter*, 1 Cox C. C. 72; *Regina v. King and Braddon*, Ib. 232; *Regina v. Williams*, Ib. 289; *Woolrych on Criminal Law*, ed. 1862, p. 183.

ADAM WILSON, J., read the following judgment, prepared by

HAGARTY, J.—These prisoners were indicted jointly with one Abbey for felony. Having severed in their challenges, the Crown elected to proceed against these three, leaving Abbey, who had also pleaded not guilty, to be tried separately.

Abbey was offered as a witness for the prisoners. The Crown objecting, the learned judge rejected his testimony, and we are now to determine whether, as being charged in the same indictment, although not actually upon his trial, after pleading not guilty, and before trial or judgment, he is a competent witness.

I am of opinion that he was a competent witness, either for the Crown or for the prisoners.

I think the following authorities decisive:—

In *Regina v. King and Braddon*, (1 Cox C. C. 232, 1845,) one prisoner pleaded guilty to a joint indictment for felony. Before sentence the Crown proposed to call him for the

prosecution against the other prisoners. It was objected that the case came within Lord *Denman's* Act, 6 & 7 Vict., ch. 85, "provided that this act shall not render competent any party to any suit, action, or proceeding, individually named in the record."

*Platt*, B., having consulted *Erle*, J., said: "This is a point of very great importance, and I have consulted my brother *Erle* upon it. He agrees with me that the witness is competent. This opinion is not ours only, but it is the result of a discussion of the point with the other judges, and it is their unanimous opinion that one prisoner may be called as a witness either for or against another charged in the same indictment with a joint offence, and this upon the common law, and in accordance with the case cited, and independently of the recent statute."

The case cited was *Regina v. George et al.*, (Car. & Marsh. 111,) where, after one defendant had pleaded guilty, and before sentence, he was allowed to be called as a witness for his co-prisoner.

In *Regina v. Williams et al.* (1 Cox C. C. 289) one prisoner, Waywood, pleaded guilty, and was admitted before judgment for the Crown against the others. In pronouncing sentence, after case reserved, *Coltman*, J., said, "One Waywood was examined against you, he being himself included in the indictment. . . . The question was reserved for the judges, who have considered it, and we think that there did exist at common law no objection to his testimony, and that the statute has made no alteration in that respect."

In *Regina v. Kidman Stewart and Rosina Stewart*, (1 Cox C. C. 174,) *Alderson*, B., said, when pressed to enter acquittal as to one prisoner against whom there was but slight evidence, "If you desire to call her as evidence in favour of the male prisoner, you may do so without taking an acquittal. It is competent for you to call him for her, and her for him." This, as the editor's note suggests, seems carrying the point further than other judges have done.

In *Regina v. Gerber, Krakouer, et. al.*, (1 Temp. & Mew, 647, 1851,) after all had pleaded not guilty, the Crown proceeded against all except Krakouer, and called him for the pro-

secution. On objection that he was a party to the record, *Williams, J.*, said, "The jury have not in this case been charged with the prisoner Krakouer. The parties are tried separately. Krakouer is not upon his trial, and therefore no objection that his evidence is inadmissible can prevail. The practice of not admitting one prisoner as a witness upon the trial of another prisoner indicted with him for the same offence, is perhaps founded upon the inconvenience that would result if the party called as a witness was at the time actually upon his trial. That the witness, under the present circumstances, is admissible, has been settled for more than a century."

I also refer to *Regina v. Hambly et al.*, (16 U. C. R. 617,) and *Regina v. Clouter and Heath*, (8 Cox C. C. 237.)

I cannot reconcile these strong authorities with the case chiefly relied on by Mr. Gwynne, *Rex v. Ryan et al.*, (*Jebb's Irish Crown Cases*, reprinted as vol. iii., *English Crown Cases*, page 5,) opposed as it is to the later authorities.

I am of opinion that the testimony of Abbey was receivable either for the Crown or the prisoners, and as his evidence was tendered and rejected there must be a new trial.

As to the admission of Mr. Doyle's evidence to rebut or neutralise that of Plenderleith, I incline against its reception. Plenderleith had admitted everything as to his previous statements, and their complete variance with his testimony given at the trial, and had thus given the Crown all the advantage required to shake belief in him. Had he denied his previous statements it would have opened up a wider inquiry.

In a case in 1853, *Regina v. Williams et al.*, (6 Cox C. C. 343,) for manslaughter, a witness for the prosecution was asked whether he had seen anything done to the deceased after he was on the ground. He said, "No." It was proposed to put his deposition before the coroner into his hand. On objection, *Williams, J.*, said, "This very point was raised before me on the Welch circuit, where a witness gave evidence different to what was expected. I thought it a

point of some difficulty, but I admitted it to be done on the ground of refreshing the memory of the witness; and the Court of Queen's Bench afterwards held that I was right."

The deposition was then put into the witness' hands. He looked at it, and the same question being repeated, he still answered, "I did not." *Williams, J.*—"You cannot get any further." Counsel was then allowed to put leading questions to him on the same point. He still denied. The judge referring to Russell on Crimes (by Greaves), vol. ii. p. 897, observed that what he had now decided was not new law.

In the case before us no contradiction was needed, the witness admitting all he had previously said or signed, and being allowed to prove the account of the affair which he had previously given.

I hardly understand the position that it was proper to call Mr. Doyle to rebut any notion that public justice had been in any way tampered with. His evidence bears little, if at all, on that point.

I think, when the witness had fully admitted all his previous inconsistent statement, we are quite safe in deciding that no further evidence as to such statements should have been received.

ADAM WILSON, J.—Two questions are raised in this case, which it is of very great consequence should not remain in uncertainty. First, whether a witness who gives evidence contrary to a written statement before then made by him, and who in his examination admits that he had made such statement, but declares that it was given to relieve himself from complicity in the offence, or in consequence of promises made to him and of threats held out against him, can be contradicted either by the court or by the party who called him producing the written memorandum, or producing the person who drew it, for the purpose of denying that it was made under the circumstances stated by the witness.

And secondly, whether one of several prisoners, who divides in his challenge of jurors, so that he remains untried while

the trial goes on against the others, can be called as a witness for such others on their trial.

The evidence of the witness was as follows :—

“*James Plenderleith*.—I remember Carleton races : saw prosecutor at the races in Irwin’s tent : Foster was selling liquor : Jerrett came there a quarter of an hour afterwards : prosecutor was half-drunk, talking about cock-fighting : I said quite drunk, not sober enough to know what he was doing ; he drank six or seven times ; prosecutor said he had not a cent, and wanted to sleep there : he pulled off his boots, and went out of the tent to go and get a bed : I fed my horse and came back to the tent : the prosecutor also got back and said he had been robbed.”

The learned judge then notes : “ The witness is asked if he had not made another statement quite different. Mr. Boulton objects that the Crown cannot discredit its own witness. The Crown counsel says that the witness was called because he gave quite a different statement, which was reduced to writing and signed by him.”

The learned judge ruled that this witness could be so examined, and accordingly he examined the witness himself.

The witness said he had made quite a different statement to the prosecutor’s counsel, (Mr. Doyle.) The learned judge then reports : “ I asked him if he signed the document shewn to him as being what he would swear to. He said he did, and that it was his signature : that it was all untrue and all a lie, and he made it to save himself.”

Mr. Doyle then desired to give evidence to shew his connection with Plenderleith’s statement, which was objected to by the prisoner’s counsel.

Mr. Doyle said : “ I was employed by the prosecutor before the justices, and in looking after the prosecution for the prosecutor. Colgan, the detective, told me he had found the party (Plenderleith) at Whitby he had been so long trying to find. The father of Plenderleith came to me and stated his son would make a statement. I cautioned Plenderleith to be careful as to what he was saying. I told him, if he told the whole truth, that on the part of Healy I would promise not to take proceedings, but I could not

say what the Crown officer would say. His father came to me with him, and he made the statement as taken down by me. It was read over to him, and he signed it.

The following is the written statement:—

“The Queen v. Jerrett et al.

“I, James Plenderleith, do hereby state that I am a jockey and horse-trainer; I was at the Carleton races in the latter part of last June, about the 23rd or 24th. I remember the first day of the races. I was there all day. About dark I left the racecourse with David Abbey, and went to Barney Irwin’s tent. I saw an old man there. I did not then know him. I now recognise Mr. Healy as the same person. William Myers, William Jerrett, Duncan McLaughlin, Richard Hughson, and Richard Foster, and a man I did not know were there. Healy was drinking. I saw him drink more than once. He was pretty tipsy; he was sober enough to know what he was about. I got there about eight o’clock. Abbey only stayed a little while, about a quarter of an hour. He did not come back while I was there. Healy asked for a bed. Foster said, ‘Give me your money.’ Healy said he had none; Foster said unless he counted out his money he could not stay there. Healy said he had not any. Old Healy then commenced talking about cock-fighting. After a short time Jerrett asked Healy to treat; he said he had no money; Jerrett said he would see. Jerrett caught hold of him and threw him down on the ground, and slapped him with his hand. Myers and McLaughlin joined Jerrett in striking Healy. I saw Myers kick him in the face. I saw McLaughlin strike him. Myers tore Healy’s clothes, so did McLaughlin. McLaughlin tore Healy’s pocket, and Myers took away his pocket-book. They were at him about ten minutes. I saw Healy’s eye was black. I think his mouth or nose was bleeding. They pulled his boots off; McLaughlin did this. They wiped Healy’s face with a towel; Healy was then insensible. They pulled him to one side of the tent. Jerrett, Myers, and McLaughlin then went up to the bar. Jerrett took the pocket-book from Myers, opened it, and took out two sovereigns; he kept one and put the other back. Foster asked to see the money was all right. He took out one sovereign and kept it. Jerrett then took back the pocket-book, and took out all the bills I could see in it. Myers then took the pocket-book; Myers said he would tell if he did not get his share; Jerrett said, ‘Wait until it is changed.’ All except Foster then went out of the tent. Before doing so they asked me if I would tell what I saw; I said, No, unless I

was made to do so. Hughson said he would tell. Jerrett took him to the back of the tent and talked to him; this seemed to satisfy Hughson. I stayed about an hour or so. I then left and came to town. Foster told Healy he knew he had money, and that he must count it over to him. The old man said, 'Boys, don't kill me.'

(Signed) JAMES PLENDERLEITH."

Mr. *Gwynne*, Q. C., contended that Mr. Doyle was rightly called, because he was called by the court, and not by the prosecutor, for the purpose of shewing that the course of justice had not been tampered with, and not for the purpose of discrediting the witness; but that at all events his being called was of little consequence, as there was quite sufficient evidence against the prisoners to maintain a conviction without regard to any effect which Mr. Doyle's evidence might have had.

It is not contended that Mr. Doyle could have been properly called to contradict the witness, and it would seem, notwithstanding the very strong opinion of the late Lord *Denman*, C. J., expressed in *Wright v. Beckett*, (1 Moo. & Rob. 414,) and adhered to by him, as appears in *Dunn v. Aslett*, (2 Moo. & Rob. 122,) that the practice of the majority of the judges has been directly opposed to the allowance of such a course.

In the case of *Rex v. Oldroyd* (Russ. & Ry. 88) the judge ordered the depositions of a witness taken before the coroner to be used against her, for the purpose of impeaching her evidence given before the jury, and his ruling was maintained by the whole of the judges; and Mr. *Gwynne* relies upon this case as a precedent for the course which he says was pursued upon this occasion, and more particularly as to the right which the judge had to call Mr. Doyle, even although the counsel for the Crown could not have done so.

In *Holdsworth v. The Mayor, &c., of Dartmouth*, (2 Moo. & Rob. 153,) *Parke*, B., allowed a witness who had given evidence unfavourable to the side which called him to be asked whether he had not before given a different account of the matter; but he would not allow, on the witness' denial

of his having given such different account, another witness to be called to shew that he had in truth given another account.

That learned judge says: "The effect and object of the evidence is to discredit the witness. It goes to his general credit to shew that he has given a different account of the matter before, and it is a clear rule that a party has no right to put a witness into the box as a witness of credit, and when he gives unfavourable evidence to call testimony to discredit him."

The case of Elizabeth Melhuish, an infant, by John Melhuish, her next friend, v. Collier (15 Q. B. 878) reviews all of the cases which were cited on this argument; and as that was before the Imperial Act 17 & 18 Vict., from which our Common Law Procedure Act has been taken making special provision for the contradiction of witnesses who may, in civil cases, give adverse testimony to the party calling them, that decision in the civil case at that precise period suits this particular case, which is one of a criminal character, under the present existing law.

In that case, which was trespass for an assault and battery, one Elizabeth Tremlett, who had been the plaintiff's fellow-servant, was called as a witness on her behalf.

On her examination in chief she stated that at the time in question the defendant's wife and the plaintiff, one of her women-servants, were clinging together, (to protect the defendant's wife from the violence of her husband, the defendant,) and as the defendant was endeavouring to part them the plaintiff fell over a chair; but the witness did not speak to any act of violence committed on the plaintiff by the defendant.

The plaintiff's counsel then questioned the witness as in cross-examination, and asked her whether she had not seen her master take the plaintiff by the hair. She denied this. She was then asked whether on the examination before the magistrate, which was attended by the plaintiff's attorney, she had not said that she had seen it. She said if she had it was all lies; that she had said things that were false on that occasion; and that John Melhuish, the prochein amy of the plaintiff, who was present at that time, had told her

what to say, and had threatened to send her to gaol if she did not say so and so. She was then asked whether she did not say to the plaintiff's attorney that she had seen the defendant push his wife upstairs, taking her by the shoulder, and pushing her with his knee.

The counsel for the defendant then objected to this course of examination, because it was an attempt by the plaintiff to discredit her own witness; and because, if the witness denied the statements alleged to have been made by her, the plaintiff would not be at liberty to contradict her by calling the plaintiff's attorney.

The learned judge, (Mr. Justice *Williams*,) after conferring with *Cresswell*, J., ruled that the question might be put, not to discredit but to remind the witness, and that the inconvenience apprehended from a suggestion of facts by the questions must be removed by cautioning the jury that the assertions supposed to have been formerly made by the witness were not to be taken as evidence of the facts. The plaintiff's counsel then asked the witness in detail whether she had not told Burridge, the plaintiff's attorney, of certain acts of violence committed by the defendant at the time in question, and she denied it in each instance.

On her cross-examination by the defendant's counsel, she said that Mrs. Melhuish, the wife of the prochein amy, had promised to give her a sum of money if she would say at the trial what she had already said to Burridge. The witness also stated that before the time of the alleged assault the plaintiff had complained to her of a hurt now said to have been inflicted by the defendant, and had said that it was caused by a fall while she was romping with her brother.

The plaintiff's counsel then called the prochein amy, and asked him if he had ever held out any threat to the witness Tremlett to induce her to give evidence. The question was objected to by the defendant's counsel, as contradicting the plaintiff's own witness, but it was allowed by the judge, and the witness denied having used any such threat. The wife of the prochein amy was then called, and she was asked if she had ever promised Tremlett money to induce her to give evidence. This question was objected to on the same ground,

but it was allowed, and the witness denied having made such a promise. The plaintiff's brother was then called, and stated (after objection made and overruled) that the romping between him and the plaintiff, referred to in Tremlett's evidence, never took place.

The judge charged the jury that although he had allowed Tremlett to be questioned as to the statements she had made to Mr. Burridge, in order to remind her of the facts, yet nothing that she had stated to Burridge was to be taken as proof of these facts. So far her evidence was to be rejected: as to the rest, the jury were to judge of its credibility. As to the other witnesses, he said it had been contended that the plaintiff, after examining the first witness, could not produce evidence to shew that her statement was wilfully untrue, or was erroneous; but the law was not so unreasonable, and it was competent for the plaintiff after examining one witness to call others, not indeed for the sole purpose of discrediting her, but to shew the truth of the facts, although differing from her statement, and also to negative her statement as to their supposed attempts to tamper with her evidence.

Mr. Justice *Patteson*, in his judgment in this case, says: "I think the learned judge was right in allowing the questions which were put to the witness herself, though he could not have permitted her answers to be contradicted if she had remembered her former statements and given evidence of them. There is a distinction between asking a witness in the box as to statements he may have formerly made, and calling other witnesses to say in contradiction to him that he made such statements. . . . As to the other witnesses: Tremlett had said that the *prochein amy* and his wife had endeavoured to tamper with her. They were witnesses to be called in the cause. The plaintiff was not to let them lie under imputation merely because Tremlett, who was first examined, had made these statements. The evidence in denial of the tampering was not given to discredit her, but to set them up, and to shew that they were not persons who had discredited themselves. I think this was not a collateral matter, and that the evidence was admissible."

Mr. Justice *Coleridge* says: "The last point is very clear. If a witness called to prove a fact disappoints you, you may call another to prove the same fact. But here the witness Tremlett did more. By anticipation she impeached the credit of witnesses about to be called. Common-sense and justice point out that these persons, witnesses in the cause, may be asked when they appear whether they cannot relieve themselves from the imputation cast upon them, and set themselves right in character."

Mr. Justice *Erle* says: "It is not now necessary to ask whether a person to whom the former statement was made may be called to contradict the witness, for it was not done here. The point is one upon which judges have differed, and opinions may vary to the end of time. As to the remaining question: where a witness alleges a fact contrary to the interest of the party calling him, it is clear the party may bring others to prove the opposite facts relevant to the case. Here the witness imputed subornation to the *procchein amy* and his wife; if that charge were believed, the jury would probably disbelieve the plaintiff's whole case. Whether or not this subornation was practised is not the precise question whether or not the defendant assaulted the plaintiff; but it is very relevant. So was the question as to the injury which the plaintiff was supposed to have attributed to a fall."

I have extracted this case at so much length because it is peculiarly applicable to the case in hand, and it appears to me to warrant the calling of Mr. Doyle to disprove as relevant the fact of Plenderleith's former statement having been made in the manner which he represented; because if it were so obtained, or he was attempted to be so dealt or tampered with, such conduct was very prejudicial to the prosecution, and for that reason I think Mr. Doyle may have been called, although he might not otherwise have been a witness in the cause.

If the witness, then, admit at the trial that he had before made a contrary statement, he may be asked what that contrary statement was, and if it was in writing it may be put in, and he may be asked if that is the statement which he so made, and whether it be true or false.

If he however deny having ever made such other statement, he cannot have the alleged statement proved against him by opposing evidence, although the facts relating to the issue may of course be proved by other witnesses who are able to speak to them of their own knowledge, and so incidentally he may be contradicted.

But whether he admit or deny having given a former different account from his present testimony, he may, if he state certain facts connected with such former statement relevant to the cause, be contradicted with regard to these facts.

I am not satisfied, however, that when the witness' evidence stood contradicted by his former statement, the jury were sufficiently cautioned against taking any part of such former statement as proof of those facts which were then described, and that they were told to reject such statement altogether, and to judge of the credibility of the witness only as to his evidence given at the trial.

It would rather seem in this case that the whole of Plenderleith's testimony, former statement and all, went to the jury in somewhat the same way as it did in the case of *Ewer v. Ambrose*, (3 B. & C. 746,) where the answer of the witness was put in in opposition to his *viva voce* testimony, and the jury were asked to say whether "they gave credit to the witness' answer in Chancery or to his testimony in court," and for which direction the verdict was set aside.

And as to the second question, the admission of Abbey, one of the prisoners in the same indictment, but who was not then on his trial, as a witness for the other defendants, I quite agree in the opinion of my brother Hagarty, that Abbey was a competent witness, and that the authorities may be said to be wholly in favour of it, with the exception of the case in Jebb's reports referred to in the argument.

The late Chief Justice of the court, who heard the argument of this case, does not agree that one prisoner can be called as a witness by his fellow-prisoner; for although this may be done according to the English authorities, it is not according to the practice which has hitherto prevailed in this province.

Rule absolute.

## LESLIE V. BALL.

*Attorney and Barrister—Liability when acting as both.*

The plaintiff declared in contract against an attorney, for negligence in conducting a suit for him against one P., alleging the breaches of promise to be that although P. pleaded a set-off on a promissory note, yet defendant improperly denied the making of such note, whereas the plaintiff had paid it; and also, that although defendant had notice of this a reasonable time before the trial, and that the payment could be proved by two witnesses named, yet he neglected to subpoena them, and took the case to trial without instructions; and also, that defendant did not instruct counsel to act for the plaintiff at the trial, and inform him of the facts above mentioned, but acted as counsel himself, and neither applied for an amendment of the replication, nor suggested to the court that he could prove payment of the note, which he could have done, as the said witnesses were then there attending to other duties—wherefore the set-off was allowed.

Defendant pleaded, as to so much of the declaration as alleged that he did not instruct counsel but acted as such himself, that he was a barrister in Upper Canada, and that the plaintiff never objected to his so acting; and he demurred to so much as alleged that he did not while so acting apply to amend, or offer to prove payment, on the ground that for his conduct as counsel no action would lie. Plaintiff demurred to the plea as no answer.

*Held*, (affirming the judgment of the county court,) that the plaintiff was entitled to judgment, for the defendant by acting as counsel himself could not escape liability for neglecting as an attorney to give proper instructions.

*Quære*, per Adam Wilson, J., whether, considering the union of the professions in this province, and the right of counsel in some cases to recover fees, the same exemption from liability can be claimed here as in England, even when the same person does not act in both capacities.

APPEAL from a judgment on demurrer, in the county court of the county of Wentworth.

The pleadings were as follows:—

*Declaration*.—For that, whereas, heretofore, to wit, on the 1st of August, 1859,—in consideration that the plaintiff, at the request of the defendant, had then retained and employed the defendant as an attorney of Her Majesty's Court of Queen's Bench for Upper Canada, to prosecute and conduct a certain action in the said Court of Queen's Bench, by and at the suit of the plaintiff, against one Samuel Platt, for the recovery of a certain large sum of money, which the plaintiff claimed to be due to him from the said Samuel Platt for fees and reward payable by the plaintiff to the defendant in that behalf,—he, the defendant, then promised the plaintiff to use due and proper care, skill, and diligence in and about the bringing, prosecuting, and conducting the said action, nevertheless the said defendant

disregarded his promise in this, that he did not use due or proper care, skill or diligence in and about the prosecuting or conducting the said action ; but, on the contrary thereof, the said defendant, as such attorney, then prosecuted the said action in a careless, negligent, irregular, unskilful, and improper manner, contrary to his duty as such attorney, in this, to wit, that, although the said Samuel Platt pleaded to the said action a plea of set-off upon a certain promissory note, for the sum of £37, 10s., made by the plaintiff, payable to one John Master, or bearer, yet he, the defendant, without receiving proper instructions from the plaintiff as to such plea, filed and delivered an improper replication to the said plea, that the plaintiff did not make the said note, whereas in fact the plaintiff had made the said note, but had paid the same before the commencement of this action to the holder thereof, after the same had become due ;—and also in this, that although he, the defendant, had notice a reasonable time before the trial of the said action that the plaintiff had given said note, but that the said note had long before that time, and after the same had become due, been paid by the plaintiff to the holder thereof, and that the fact of such payment could be proved at the trial by the evidence of two witnesses, that is to say, Charles Durand and Thomas Miller, who were then within the jurisdiction of the said court, and either of whom would have proved that fact if they had been called upon to do so, yet he, the defendant, neglected to have such witnesses subpoenaed, or to request them, or either of them, to attend to give evidence in that behalf, and carried the said cause down to trial, and had it called on for trial in the absence of the plaintiff, and without his instructions so to do, without being prepared with any evidence to rebut the set-off pleaded by the said Samuel Platt ;—and also in this, that the defendant did not instruct counsel to act for the plaintiff at the trial of the said action, and inform such counsel of the facts within the knowledge of the defendant as hereinbefore mentioned, but acted as counsel himself, and neither applied for an amendment of said replication, nor did he suggest to the court at the trial that he could furnish evidence to shew that the note had been paid, as

aforesaid, or offer to produce such evidence, which he was then able to do, as the witnesses above mentioned were then in court attending to other duties there. That one John Master was called by the defendant at the said trial, who proved the making of the said note by the plaintiff, whereupon, and by reason of which said premises, the jury sworn to try the said cause allowed to the said Samuel Platt, as a set-off against the plaintiff's claim, the amount of said promissory note, with interest thereon, and the plaintiff was prevented from recovering the whole amount of his claim against the said Samuel Platt sought to be recovered by him in the said action, which he otherwise could and would have recovered; but, on the contrary thereof, wholly lost the means of recovering a large portion of the said money so claimed and sought to be recovered by the plaintiff from the said Platt as aforesaid, to wit, the amount of the said promissory note, with interest thereon.

*Fourth plea*, as to so much of the declaration as alleges that the defendant did not instruct counsel to act for the plaintiff at the trial of said action, but acted as counsel himself, the defendant says that he was and is a barrister in that part of Canada called Upper Canada, and as such authorised to act as counsel in the trial of causes in the said courts; and the defendant further says that the plaintiff had not at any time objected to his so acting as counsel.

And as to so much of the said declaration as alleges that the defendant did not, while acting as counsel in the said cause, apply for an amendment of said replication, nor suggest to the court at the trial that he could furnish evidence to shew that the note aforesaid had been paid, or offer to produce such evidence, the defendant demurred, on the ground that a counsel cannot be liable in an action for his conduct when at a trial.

The plaintiff joined in defendant's demurrer, and demurred to the fourth plea, on the grounds that the same is no answer to any part of the plaintiff's cause of action, and that the defendant cannot separate or disconnect the portion of the declaration traversed by that plea from the rest of the sentence of the declaration in which it occurs.

Judgment having been given for the plaintiff on these demurrers, the defendant appealed.

*McMichael* for the appellant.

*Freeman*, Q. C., contra.

ADAM WILSON, J., read the following judgment, prepared by

HAGARTY, J.—I am of opinion that while we hold untouched the doctrine that a counsel acting in good faith is not liable for mere error in judgment in the conduct of a cause, we must be careful not to lay down a rule so obviously unjust that an attorney can shield himself from the clearly-defined obligations of his retainer, by alleging that he acted as counsel in the matters complained of.

The breaches assigned must be read with the previous allegations in the declaration, that defendant, as plaintiff's attorney, knew before the trial that the note pleaded as a set-off had in fact been paid, and that two named witnesses, whose attendance could be readily obtained, could prove that fact. The breach demurred to in substance amounts to this: "Knowing all these facts, you neither properly instructed counsel as to these facts, nor when you assumed to act as counsel yourself did you ask for an amendment, or suggest to the court that evidence was at hand to prove the payment."

I am hardly prepared to say that the learned judge below was wrong in holding that this breach disclosed a cause of action, for the reasons suggested above.

The demurrer of defendant fails, I think, as a necessary consequence. He has no right, I think, to separate the alternative allegations in the breach, and to pick out a part which he says charges a mere neglect or omission as a counsel, and urge to it the proposition that no liability attaches to his acts or omissions as such counsel.

The peculiar position of the profession in Canada, where the attorney may be and often is the counsel for a party in the suit, leaves this case with little illustration from English authority. I think, however, we are safe in holding that if the same gentleman act in both characters, he in no way

evades or diminishes any liability properly attachable to him as such attorney. It is conceded that omitting properly to instruct counsel is a good ground of action. If a Canadian attorney, having full knowledge of certain material facts, or the existence of material evidence, uses his privilege of acting as counsel himself, and wholly omits urging such facts or calling such evidence, I think he cannot complain if he be treated exactly as if he had omitted properly to instruct counsel.

I do not assert that a case may not readily arise in which, well aware of the facts, but in the *bonâ fide* exercise of a discretion as counsel intrusted with the conduct of the cause he declines noticing or producing evidence of them, he may not be fully entitled to a counsel's protection from action. But here we are called on to sanction the proposition (on demurrer admitting the omissions charged, and with no such suggestion as above) that the moment the attorney commences to act as counsel he is protected from all consequences that would otherwise attach on him for neglect of his client's interests.

I agree with the learned judge below that the breach must be regarded as entire.

I think the appeal should be dismissed.

ADAM WILSON, J.—As I read the declaration, I think it contains three distinct breaches. 1. That although Platt pleaded a set-off in the action of Leslie against Platt, yet that Ball, the appellant, then the attorney of Leslie in that action against Platt, without receiving proper instructions from Leslie as to such plea, filed and delivered an improper replication to the plea—namely, that Leslie did not make the note the subject of the set-off—whereas Leslie had made it, but had paid it before the commencement of that action.

2. That although Ball had notice a reasonable time before the trial of this suit of Leslie v. Platt that Leslie had long before that time paid the said note, and that such payment could be proved at the trial by two witnesses who were then within the jurisdiction of the court, yet Ball neglected to have such witnesses subpœnaed, or to request them to attend

to give evidence in that behalf, and carried the cause down to trial, and had it called on for trial in the absence of the plaintiff, and without his instructions so to do, without being prepared with any evidence to rebut the set-off pleaded by Platt.

3. That the defendant did not instruct counsel to act for the plaintiff at the trial, or inform such counsel of the facts within the knowledge of the defendant, as before mentioned, but acted as counsel himself, and neither applied for an amendment of the replication, nor suggested to the court at the trial that he could furnish evidence, which he was then able to do, as the witnesses aforesaid were then in court attending to other duties there.

On the argument in the court below, the learned judge decided that the fourth plea traversed only a part of the breach, and as the breach was entire the plea was objectionable; and the learned judge also determined that it sufficiently appeared the defendant was charged as an attorney, and not as a counsel; and he gave judgment on both demurrers for the plaintiff.

The only questions which arise at all before us on appeal arise upon what I have called the third breach; and it appears to me that the complaint there made against the defendant is not that he acted himself as counsel for the plaintiff instead of instructing other counsel for that purpose, which is the meaning the defendant puts upon this breach; but it is that while he did not retain counsel for the plaintiff and inform him of the facts of the case, he did not even, although acting as counsel himself, and with the personal knowledge of the facts before stated, avail himself of the knowledge which he possessed, and which he would have been bound to have communicated to counsel, if other counsel had been employed to act for the plaintiff.

What the plaintiff in effect says is this: "The facts which should have been brought forward on the trial were neither brought forward by you, the defendant, who appeared as my counsel, nor by any other person, whom you might have employed as my counsel if you had chosen to do so."

I think this is its meaning, although it is not clearly expressed, and although it may not be a correct view of the defendant's power to employ any counsel as he pleased.

So far, then, the judgment on demurrer to the fourth plea was rightly given for the plaintiff.

The demurrer as to so much of the declaration as it specially sets out, if it had not been a demurrer, but a plea, would, for the reasons already given in disposing of the fourth plea, have been a good traverse, because the matters contained therein contain the substance of the whole of what I have called the third breach; but the defendant demurs to the sufficiency of the declaration in this respect, because he says the defendant is charged with a neglect of duty in his character and capacity of counsel, while no action will lie against him for anything done in that capacity.

In England, no doubt, an action will not lie against a counsel for any neglect or mistake in a cause, so long as he has acted *bona fide*, because his services are gratuitously rendered, and no action can be maintained by him for any compensation. The whole law is very elaborately discussed in *Swinfen v. Lord Chelmsford* (5 H. & N. 890) (*a*.)

In this province, however, while our statute (Consol. Stats. U. C., ch. 119, sec. 1) expressly authorises the superior courts to allow fees to counsel, and such fees have accordingly been allowed by the tariff to them, and while "The County Courts Act," ch. 15, sec. 62, and "The Common Law Procedure Act," ch. 22, sec. 332, do the same thing, and while such fees may be sued for, (see *Baldwin v. Montgomery*, 1 U. C. R. 283,) it may follow, as a consequence to the right of counsel to demand payment, that counsel are here on an entirely different footing to what they are in England, where their fees are not enforceable of right.

The joinder of the two professions of attorney or solicitor and barrister may, while they are united, be a sufficient reason for the distinction here; for it certainly must be in many cases, as the one now in court illustrates, an exceed-

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(a) See also *Kennedy v. Broun*, 7 L. T. Rep. N. S. 626, 9 Jur. N. S. 119 C. P.

ingly difficult matter to separate the responsibility between the two professions exercised by and combined in the one person—to say where the responsibility of the attorney ends and that of the counsel might be supposed to begin; and therefore it may, while this united exercise of the two degrees or branches of the law exists, be better for the client that the attorney and counsel, while making a twofold profit in each of these capacities, should not be held to have a responsibility in but one of these characters, and a total exemption from accountability in the other, and perhaps the most profitable of them, and in which he might not have been employed at all if it had not been for his qualification and practice as an attorney.

I am not, therefore, prepared to say that a counsel in this country, even although he is not the attorney also, is exempt from liability to his client for such negligence on his part of the conduct of the cause as would make the attorney liable for negligence in his particular portion of it. But I think there is no doubt that a counsel who is also the attorney in the cause is certainly liable for his neglect as counsel, in like manner and to the same extent as an attorney is.

It appears on the face of this record that the defendant was both attorney and counsel for the plaintiff in the cause mentioned; and I think, whatever knowledge he was possessed of before the trial with regard to the true answer of the plaintiff to the set-off which was pleaded in that action, and notwithstanding any prior neglect of his to reply the fact of payment as an answer to such plea, that it was also his duty as attorney and counsel, both of which characters he then filled, and from neither of which can he properly be dissociated, “to apply” (even at that last moment) “for an amendment,” although he was not bound to suggest that he could furnish evidence, nor to offer such evidence, because it was wholly inadmissible as the pleadings then stood.

I am therefore of opinion the plaintiff has alleged sufficient responsibility against the defendant to entitle him to maintain his action upon this portion of the third breach.

Appeal dismissed.

ELIZABETH MCCRARY, ADMINISTRATRIX OF ROSANNA  
MCCRARY, v. MCCRARY.

*Will—Construction—Administration—Right to goods.*

Testator by his will, after devising a farm to defendant, his son, in fee, directed that he should support his mother, “and that she shall have one horse, and my buggy, cutter, and harness, to be kept on the place,” &c., “and the house and one acre of land with the orchard all round the house her lifetime.”

*Held*, that she took the goods mentioned absolutely, not for life only.

Certain other goods of testator were left in the house, where the plaintiff (his daughter) and her mother continued to live and use them for about a year, until the mother died, when defendant, who had been living elsewhere, took possession of the house with these things, and refused to deliver them up to the plaintiff as the mother's executrix.

*Held*, that the plaintiff had no such possession of these goods, either in her own right or through her mother, as to enable her to treat defendant as a wrong-doer : that as her mother's executrix she had no title ; and that she therefore could not recover for them.

THE plaintiff, as the executrix of her mother, sued the defendant, her brother, for converting the goods in question, which she claimed in respect of the title of the testatrix under the will of the testatrix's husband, the father of both the plaintiff and defendant.

Defendant pleaded not guilty, and that the goods were not the plaintiff's.

At the trial, at Belleville, before *Hagarty, J.*, it appeared that the will gave to the defendant the west half of lot No. 5, in the sixth concession of Tyendinaga, to him, his heirs and assigns, and it proceeded : “I order and direct that my said son William (the defendant) shall well and comfortably support and maintain my beloved wife in sickness and health, and provide for her all necessaries of life during her natural life ; and that she shall have one horse and my buggy, cutter, and harness, to be kept on the place and well attended, and she shall have two cows to be kept on the place with the increase of the young cattle now on the farm, and the house and one acre of land with the orchard all round the house her lifetime.”

There were two different classes of goods claimed by the plaintiff :—

Firstly, the horse and other articles specially mentioned in the will just recited, and bequeathed to the testatrix.

Secondly, a variety of other articles, which had been in

the possession of testatrix from her husband's death, and which had been the husband's property.

The plaintiff claimed the first class absolutely as the property of the testatrix under the will, or at any rate that she was entitled to such goods, and to the second class also, as the testatrix's property; at all events, as against the defendant and against every one but the executors under the original proprietor's will.

The defendant contended that his father's will conferred but a life-interest upon his mother in the goods devised to her in the will, and that he was at liberty to set up the *jus tertii* against the plaintiff's recovery.

The learned judge was of opinion that the will bequeathed the horse and other articles specifically enumerated in the will of the testatrix absolutely, and he requested the jury to value such goods separately, which they did at \$150. The remainder of the goods were valued at \$130, and he reserved leave to the defendant to move to restrict the verdict to the \$150 only, if the court should be of opinion that the plaintiff was not entitled to recover more than the goods which were mentioned in the will.

*Jellett* obtained a rule *nisi* to reduce the verdict, pursuant to leave reserved, or for a new trial for misdirection.

The *Solicitor-General* shewed cause, and cited Wms. Exrs. 5th ed., 972, 1236; *Foster v. Bates*, 12 M. & W. 226; *Welchman v. Sturgis*, 13 Q. B. 552.

*Jellett*, contra, cited Wms. Exrs. 784.

The evidence, so far as it is material to the points raised, is sufficiently stated in the judgment.

ADAM WILSON, J.—I think the words, “and that she shall have one horse,” &c., do expressly give a bequest of the entirety of the property to the legatee; and that the words of limitation in the succeeding devise, “and the house and one acre of land, with the orchard all round the house, her lifetime,” are not to be read as cutting down her absolute interest in the personalty to an estate for life only, but are to be read as applicable to the realty alone, and as

strengthening the claim of the legatee to the whole interest in the personalty. Her title, although restricted for life to the realty, is left without any qualification as to the personalty.

Then it was urged by the defendant that the portion of goods which was valued at \$130, and which is beyond the will altogether, the plaintiff was not entitled to recover for. The question is not very clearly raised by the evidence so far as the notes shew, but it was certainly urged by the defendant.

The following is the substance of the evidence applicable to it: "All the goods in question were in the house which the mother and plaintiff occupied, or about the premises in their possession. The defendant was not living in the house, but boarding elsewhere. On the night of his mother's burial the defendant came to the house and forbade the plaintiff from moving any of the property, and said he would come in the morning and lock everything up. The plaintiff locked the things up in the house and hung up the key, and told the defendant where she had left it. The defendant took possession of the house and of the things that were in it." These articles that were in the house are the subject of this suit. (a)

The defendant set up that the goods not covered by the legacy to his mother were not his mother's property, and therefore not the property of the plaintiff as her executrix, but the property of the executors under his father's will. The plaintiff answered that the defendant was a wrong-doer, and could not set up the title of a third party to justify his wrongful act.

If the defendant had entered upon his mother's possession, or even upon the plaintiff's possession, and been a mere wrong-doer, he would not have been at liberty to have justified his wrongful act by setting up the title of any third party with whom he was in no way in privity; but the plaintiff was in no other way in the actual possession of the goods than by having been an occupant of her mother's

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(a) The mother, it appeared, had lived for about a year after the death of her husband.

house, and continuing her residence there until the funeral was over, when the defendant entered the house, as he lawfully might, took possession of the goods, and refused to deliver them up to the plaintiff as executrix of her mother, on demand made upon him. Now the question is whether this is an entry upon the plaintiff's possession, and is such a possession that title is in no way necessary to be proved, or whether this is not a case in which the plaintiff is either resting upon title or is bound to rest upon title, and in which therefore the defendant may impeach that title by setting up a better title in some other person, although claiming no title himself.

In *Elliott and Wife, administratrix, v. Kemp*, (7 M. & W. 306,) a Mr. Lane died in 1827 intestate. On his death his widow, who was the mother of the plaintiff's wife and of the defendant's wife also, removed the greater part of the furniture to another house, in which she resided till her death with her daughter, the plaintiff's wife, and continued to use the furniture. In 1829 the widow took out administration to her husband's estate, and died in 1832. In 1838 the whole of the furniture was sold by the defendant's order, with the consent of the plaintiff's wife; but some disputes arising about the distribution of the proceeds, the plaintiff's wife took out administration in 1840 to her mother, and as her administratrix brought this action of trover for the alleged conversion by sale in 1838.

Upon this state of facts, at the trial it was ruled by *Parke, B.*, that the plaintiffs were not entitled to recover, but that administration *de bonis non* should have been taken out to the estate of Mr. Lane.

The plaintiff contended that the defendant was a mere wrong-doer, and could not dispute the title of Mrs. Lane, who had been for several years in actual possession of the furniture in question, or of the plaintiff as her representative. When it was argued afterwards before the full court, it was urged that Mrs. Lane's possession for two years and a half was sufficient evidence of title in her as against a mere wrong-doer, to which *Parke, B.*, answered, "But here the wrong is done to no particular party in actual possession.

The goods were then *bona vacantia*. Then the question is, Who has the *legal* right by relation to the grant of administration? What defence would the defendant have against the party who should afterwards take out administration *de bonis non*?"

In giving judgment, *Parke*, B., said, "It is unnecessary in this case to decide the question whether in an action of trespass or trover for *personal* property the simple fact of possession, which is unquestionably evidence of title, is *conclusive* evidence, and constitutes a complete title in *all cases* against a defendant who is a mere wrong-doer, as it does in actions of trespass to real property, and in those actions for injuries to personal chattels in which the plaintiff had a special property in such chattels; for in the present case the plaintiffs were not in possession of the chattels, the subject of this suit, at the time of the conversion. . . . But the title of the plaintiff as personal representative of Mrs. Lane relates back to her death with respect to these chattels only which were her own, and which vest in her administrator; and the simple question then is, whether the chattels in question were her own property. If they were not, the plaintiffs have no title whatever to them, and cannot maintain this action. . . . Her possession, and still more the use of these chattels, is no doubt evidence of title in her own right; and if there was no other proof in the case, would unquestionably be sufficient; but when it appears that the goods were her husband's at his death, and her possession that of an administratrix, it becomes a question upon all the facts whether she had acquired a title or not in her own right; and we are not satisfied that she did." See also *Fyson v. Chambers*, (9 M. & W. 460,) and *Jefferies v. The Great Western Railway Co.*, (5 E. & B. 802.)

As it appeared that the portion of goods not bequeathed to the plaintiff's mother was not her own absolute property, but had been the goods of her husband, and apparently continued to belong to the estate, although they remained in her possession and were used by her; and as these goods were not otherwise in the plaintiff's possession than by being in the house where she and her mother had resided,

and into which the defendant entered so soon as his mother's funeral was over, I am of opinion the plaintiff had no such exclusive possession in his own right or otherwise as to be able to treat the defendant as a mere wrong-doer. The defendant had therefore the right to question the plaintiff's title, and upon the title as to all the goods not bequeathed to the mother I think the plaintiff fails. The verdict, therefore, in my opinion, should be reduced to \$150.

I am authorised to say that the late Chief Justice of the court concurs in this decision, and I believe that my brother *Hagarty* during the argument was also of the same opinion.

Rule absolute to reduce the verdict to \$150.

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SMITH V. THE TRUST AND LOAN COMPANY OF UPPER  
CANADA.

*Mortgage—Sale under power—Garnishment of surplus—Trust money—  
Payment of prior mortgage.*

The Trust and Loan Company held a mortgage from one O., with power of sale for cash or upon credit, and under it on the 22nd of November sold the land to C., who paid them part in cash and gave a mortgage for the balance. There was a mortgage upon the land to one D., executed before but registered after theirs, and they paid to D.'s assignee out of the cash received the surplus of the whole purchase money above their claim. Their mortgage declared that they should stand seised of the proceeds of any sale in trust to apply it as there mentioned. A judgment creditor of O., having served his attaching order on the 25th of November, sued the company as garnishees for such surplus.

*Held*, that he could not recover, for, 1. Defendants were trustees, and could not be sued at law for the money, even if they had wrongfully paid it over to D. ; and

2. They were justified in so paying, notwithstanding the jury found that D.'s mortgage was fraudulently kept alive for O.'s benefit, for defendants had no knowledge of such fraud.

APPEAL from the County Court of the County of Elgin.

*English* for the appellant. *M. R. Vankoughnet* contra

The facts of the case and the authorities cited on the argument, which took place in Easter Term last, are sufficiently stated in the judgments.

ADAM WILSON, J.—This was an action by the judgment creditor of one Joseph Orr against the now defendants as

garnishees, in which they were charged for money said to have been received by them for the use of Orr, and also upon an account stated.

The pleas were never indebted, and that before action defendants satisfied and discharged the claim by payment, on which issue was joined.

The attaching order was served on the 25th of November, 1861, upon the now defendants; and the sale by the defendants, who were mortgagees of Orr, of certain lands, which they effected under a power of sale contained in such mortgage, was made on the 22nd of November, 1861.

The defendants had power to sell upon credit or for cash, or partly by one and partly by the other of such means.

Upon this sale the sum of \$2675 was bid by one Clemens, who became the purchaser of the land.

The terms were, in cash \$525, and by a mortgage on a credit for some years \$2150. Out of the sale for \$2675 there was due to the defendants \$2309, 65c., leaving a surplus of \$365, 35c. to be accounted for by the defendants to the person or persons who might be entitled to receive the same. The plaintiff's claim was \$241, 03c., and he asserts that he is the person who is entitled to as much out of the above surplus as will satisfy his debt.

By the provisions of the defendants' mortgage from Orr they were authorised to sell in the manner before stated. Until therefore they did receive in cash the full amount of their claim they had no money properly applicable either to Orr or to any one else claiming from or under him. That they did pay over the above sum of \$365, 35c., as hereafter stated, out of the first money paid to them, instead of compelling the party to wait until he should be paid out of the last money, can be no reason why they should be the more obliged to pay the plaintiff now, even although the payment made by the defendants was made to a wrong person instead of to the plaintiff, than if the plaintiff had been seeking to enforce payment from the defendants while the money was actually in their hands.

The defendants assert that the proceeds of the sale under their power were trust funds, by the express terms of their

mortgage, which declares that the defendants shall stand seised and possessed of the proceeds upon trust to pay the expenses of sale, then the debt and interest, and lastly as to the surplus, (if any,) which last provision, however, is not properly set out in the case; and that they therefore as trustees could not be sued at law either by Orr, the mortgagor, or by any one else claiming to have or to exercise his rights. And they assert, moreover, that as they have not received their own demand in cash, they cannot at all events be required to pay to any one until that payment shall actually have been made.

The plaintiff asserts that this should not be treated as trust money, because the defendants have actually paid over more than sufficient to satisfy his debt, as hereinafter mentioned; and if that person be held not to be entitled as against the plaintiff to retain that money, that the defendants cannot be allowed to give it the character of trust funds again to prevent his legal claim upon it. And he also asserts that although the defendants might not have been compellable to have diverted any portion of the instalment of cash towards any other than their own claim until that was satisfied; yet they having done so in fact, and having retained just so much of the cash which with the new mortgage will together satisfy their whole demand upon Orr, they cannot now be permitted to say that this surplus is in any degree applicable to their own debts.

I feel bound to decide, upon so much of the facts as have been laid before us, that the defendants were trustees of the proceeds of the sale which they made according to the plain provisions of the power which conferred upon them the right of sale; and being so, it appears to be satisfactorily settled that an action at law will not lie against them by any person who is compelled to claim it from them in that character.

McDowall v. Hollister (25 L. T. Rep, 185, Ex.) shews that a legacy cannot be attached in the hands of an executor, unless there has been such an account stated between the executor and the legatee as would enable the latter to sue at law for it. The other cases cited by my brother

*Hagarty* establish the same point; nor do I think the case referred to by Mr. English of *McKay v. Mitchell*, the Trust and Loan Company, garnishees, (6 U. C. L. J. 61,) conflicts with any of these decisions; for in that case there was an express covenant by which the garnishees there bound themselves to pay such surplus, upon which at law an action could unquestionably have been sustained by the person entitled to the surplus.

I also feel bound to decide, if this money in question were trust money when it was paid over by the defendants to Roe, as afterwards mentioned, that it did not lose its character of trust money by such payment over if it was paid by the defendants to the wrong person, for in such case the defendants would be entitled to claim its return from the wrongful holder of it.

The case of *Davison v. Atkinson*, (5 T. R. 434,) is precisely in point, where the same argument was used as is used here, that "as the trustees had paid the money over to the defendant, it was money had and received by the defendant to the use of some person."

And *Jervis*, C. J., in commenting on this case in *Bird v. Pegrum*, (13 C. B. 649,) says, "It is plain that the money never ceased to belong to the trustees, they having paid it over to the wrong person, and consequently not having discharged themselves of their trust."

There are, however, some other facts in the case which seem to me to entitle the defendants to maintain the nonsuit, which was ordered to be entered for them by the learned judge below.

Orr, the original execution debtor of the plaintiff, and the mortgagor of the now defendants, before making this mortgage to the defendants had made a mortgage to one Drake, from whom he had bought this land, for the balance of the purchase money. This mortgage, though made in point of time before the mortgage to the defendants, was not registered until some time after the mortgage to the defendants had been registered. Drake, however, makes no complaint of this proceeding, and was probably a consenting party to it. Drake afterwards assigned this mortgage to

Charles Roe, and it was registered by Roe in November, 1859.(a)

If any one, therefore, were entitled to receive the surplus from the defendants of that sale, it was Roe, the assignee of this particular property, whose interest was being excluded by such sale; and perhaps no objection would have been raised by the plaintiff to Roe's apparently better claim, if he had not believed that this mortgage was kept colourably on foot for the benefit of Orr, the execution debtor and mortgagor, and so the jury found; but they seem to have so found upon very insufficient testimony, and notwithstanding their finding it does not appear how the defendants are to be visited with this unless it is shewn, of which there is not the slightest pretence, that they were either parties to, or at any rate that they were cognizant of, this colourable maintenance of the mortgage before they paid the surplus over to Roe, the assignee of this mortgage; and it would be very hard indeed if the defendants, who have acted more liberally than they were called upon to do by paying in advance and in preference to themselves a claim which they might legally have postponed for years to come, should, now that they have paid it over in good faith, be called upon to satisfy this plaintiff, who founds his claim against them upon an imputed fraud of which they are as innocent as he is.

I therefore quite agree that the appeal should be dismissed with costs.

Mr. Justice WILSON read the following judgment prepared by

HAGARTY, J.—The exact terms of the covenants contained in Orr's mortgage to the Trust and Loan Company are not before us on this appeal. From what I have seen of other mortgages to this company, and a reference to the case cited, before *Draper*, C. J., of *McKay v. Mitchell*, I am not without suspicions that an important part of the covenant as to

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(a) The assignment of this mortgage to Roe, which was not dated, was stated in the evidence to have been executed some time in the summer of 1861, and the payment by defendants to Roe to have been made in February or March, 1862.

exercising the power of sale, and as to the surplus, may have been unintentionally omitted. This might have affected the question as to the existence of a garnishable debt, apart from the point as to whether any moneys remained available to the plaintiff's claim, but in the view I take of the facts and law it is unimportant.

The garnishees were empowered to sell on credit, and did so. The recital in the mortgage from Clemens, that they were advancing money to him, creates no estoppel in this suit, as was contended.

Upwards of \$500 cash was received by them after deducting the expenses of sale, and they seem to have paid the residue of this cash to Drake, or rather to Roe, his assignee, on a mortgage made anterior to their own security, but not registered till 1859, subsequent thereto. I see no reason to doubt but that this was paid in good faith; and I am of opinion they were fully warranted in paying it as against the present plaintiff, treating it as a debt duly assigned by Orr, the original mortgagor, before the attaching order. On this I refer to *Hirsch v. Coates*, (18 C. B. 757,) *Webster v. Webster*, (6 L. T. Rep. N. S. 11.)

I am therefore of opinion that there was no money in the hands of the garnishees nor debt of any kind on which the plaintiff's order can attach.

I do not think it necessary to discuss the other point, on which the judge below in his very carefully-prepared judgment seems chiefly to have relied, namely, that the garnishees being trustees, and no balance finally struck, there could be no legal debt to attach. I abstain from entering thereupon because I have not before me the precise words of the power of sale and covenants entered into by the mortgagees.

I fully agree in the principle that unless the judgment debtor could have sued as for a legal debt there was nothing to attach, and refer to *McDowall v. Hollister*, (25 L. T. Rep. 185, Ex.,) *Geraghty v. Sharkey*, (30 L. T. Rep. 204.)

I do not place much reliance on the answer given by the jury as to Drake's mortgage being improperly kept on foot. Nothing is brought home to the garnishees to implicate them

in any collusion, or *malâ fide* payment of the money in their hands.

I think the judge was right in making absolute the rule for nonsuit, and that the appeal should be dismissed with costs.

Appeal dismissed.

IN THE MATTER OF ROSE AND THE CORPORATION OF THE  
UNITED COUNTIES OF STORMONT, DUNDAS, AND GLEN-  
GARRY.

*By-law—Roads assumed by county—Repairs of—Uncertainty—Consol.  
Stats. U. C., ch. 54, secs. 339, 340, 342, sub-sec. 8.*

A county council passed two by-laws. 1. Assuming certain roads within a township, and enacting that the undivided one-half of such roads should be kept in repair by the township corporation, and the undivided one-half by a village corporation named; and 2. A subsequent by-law, directing that \$400 should be raised thus, \$200 to be assessed and collected out of all the rateable property of the village, and \$200 of the township.

*Held*, that both by-laws were bad; for as to the first, the portion of the road to be kept in repair by each municipality was not sufficiently defined; and as to the second, the county had no power to direct how the money required should be procured by the municipalities.

*Per Adam Wilson, J.*, under the Municipal Act, secs. 339, 340, 342, sub-sec. 8, the county had no power thus to assume the roads and compel the local municipalities to improve them; that expense should be borne by the county.

*Stephen Richards, Q. C.*, in Michaelmas Term last, obtained two rules, calling upon the corporation to shew cause in the one rule why that part of a by-law, passed on the 20th of June, 1862, in the following words:—

“Be it further enacted, that the undivided one-half of the above-recited roads shall be supported and kept in repair by the corporation of the township of Williamsburgh, and that the undivided one-half of the above-recited roads shall be supported and kept in repair by the corporation of the village of Morrisburgh,” or to the like effect, should not be quashed for illegality, with costs on the following grounds:

1. Because the roads in the by-law mentioned are within the township of Williamsburgh, and were not county roads before the passing of the said by-law, but are by the by-law assumed as county roads; and it was the duty of the corporation of the united counties, under the 340th section of the

Municipal Act, to cause the said roads to be planked, gravelled, or macadamised, and any bridges thereon to be built at the expense of the said united counties, which has not been done, nor has any by-law been passed, or any other provision been made for that purpose; and that the corporation of the united counties had no power by law to impose the duty of supporting or keeping the roads in repair on the corporations of Williamsburgh and Morrisburgh, as they have attempted to do by the said by-law.

2. That even if the corporation of the united counties had the power to impose such duty upon the corporations of Williamsburgh and Morrisburgh, the said part of the by-law is bad, because it is not defined or enacted therein, or in any part of the by-law, what distinct part or parts of said roads each of the corporations of Williamsburgh and Morrisburgh are to maintain and keep in repair.

And in the other rule, why all that part of the by-law of the united counties, passed on the 15th of October, 1862, in the following words:—

“Be it further enacted, that the said sum of four hundred dollars shall be raised in the following manner, that is to say, the sum of two hundred dollars shall be assessed, levied, and collected upon all the rateable real and personal property of the township of Williamsburgh, and the like sum of two hundred dollars shall be assessed, levied, and collected out of all the rateable real and personal property of the village of Morrisburgh,” or to the like effect, should not be quashed for illegality, with costs, on the following grounds:—

1. Because the roads in the said by-law mentioned are within the township of Williamsburgh, and were assumed as county roads by a by-law of the united counties, passed in the month of June, 1862, and were not county roads before the passing of the last mentioned by-law; and it was the duty of the corporation of the united counties, under the 340th section of the Municipal Act, &c., (to the same effect as in clause No. 1 of the preceding rule.)

2. That even, &c.; (as in clause No. 2 of the preceding rule;) and is also bad for attempting to assess and levy a

specific sum of money on the rateable property of or in each of the municipalities of Williamsburgh and Morrisburgh, instead of defining or enacting which or what part of the said roads and bridges shall be improved or maintained by each of the municipalities.

The by-law of June recited, "That county councils are empowered to pass by-laws assuming any road as a county road, and to declare by what local municipality or municipalities such road shall be supported; and whereas it is deemed just and equitable to assume certain roads in the township of Williamsburgh;" and upon this it proceeded to declare that certain roads should be county roads, and "That the undivided one-half of the roads shall be supported and kept in repair by the corporation of the township of Williamsburgh, and that the undivided one-half of the roads shall be supported and kept in repair by the corporation of the village of Morrisburgh."

The by-law of October was entitled "A by-law to levy a certain sum of money on the township of Williamsburgh and the village of Morrisburgh, for the support of county roads in the township of Williamsburgh." It recited the by-law of June, and that it was necessary, in order to put said by-law in force, to raise a sum of money for the improvement of such roads, and to appoint commissioners for laying out and expending the same. And it enacted that the sum of \$400 be granted and expended in manner following, that is to say, &c., specifying the work to be done on the roads in question, and directing that the money should be raised as set out in the rule. It then proceeded to appoint two commissioners for said roads, "to prepare specifications of said works, and after duly advertising by posting notices proceed to sell such work at public auction, in sections of not more than \$100 each," and to take security for due performance of the work, &c. &c.

The affidavits filed, in addition to the above facts, shewed that the roads in question lay wholly within the township of Williamsburgh, and did not divide two municipalities in the counties.

In shewing cause, in last term, *M. R. Vankoughnet* and

*R. A. Harrison* filed certain affidavits, to the effect following: that in November last contracts were made by the united counties for turnpiking and gravelling certain portions of the roads in question, and for rebuilding a bridge upon the same line of road; and that the two commissioners appointed under the counties' by-law, one for Williamsburgh and the other for Morrisburgh, made the sales for the contracts, and it was not until after this time that Mr. Casselman, the commissioner for Morrisburgh, refused to act any further; and that the \$200 directed to be paid by Williamsburgh was paid over before the rules issued on this application.

And the defendants' counsel contended that it was not necessary that the counties should first have done the work upon the roads, before casting the expense of maintaining them upon the local municipalities, because the Municipal Act does not require the counties to do the work, but only to cause it to be done, and this is sufficiently done by directing it to be done at the expense of the local municipalities:

That although the by-laws do not point out and define specifically which part of the roads each of these municipalities shall keep in repair, the court would not quash the by-laws as of course unless the objection be apparent upon their face, (*Hodgson and The Municipal Council of York and Peel*, and of Ontario, 13 U. C. R. 268; *Grierson and the Provisional Council of Ontario*, 9 U. C. R. 623; *Sutherland and The Municipal Council of East Nissouri*, 10 U. C. R. 626:)

That the direction in the October by-law, that Williamsburgh and Morrisburgh shall each raise \$200, "to be assessed, levied, and collected upon all the rateable real and personal property in each respective municipality," is not objectionable, as it is only a mode of procuring the money, and a different course may be adopted of getting the money than that pointed out, although there is direct power to levy county rates, by Consol. Stats. U. C., ch. 55, secs. 75, 76:

That the purpose of the by-law of October had been answered so far as Williamsburgh was concerned, which was to raise \$200; and as this had been done the by-law was spent, and could not or ought not now to be interfered with,

(*Michie and The City of Toronto*, 11 C. P. 379; *Terry and The Municipality of Haldimand*, 15 U. C. R. 380:)

That two rules should not have been moved, which had greatly increased the costs, and that there should be no costs at all if the by-laws were good in part, (*Patterson and The County of Grey*, 18 U. C. R. 189.)

*Stephen Richards*, Q. C., in reply, said that he asked for the leave of the court to take separate rules, as he thought there was a difficulty in moving against the two very different by-laws in one rule, and that he obtained leave to proceed by the two rules. He contended that the road was not before these by-laws a county road, as it lay wholly within the township of Williamsburgh, and not between townships: that if the counties assume a road in such a case as a county road, the counties must improve it, and must do so at their own expense; they cannot throw the expense of it upon the local municipalities: that the counties were endeavouring to evade the effect of sec. 340: that the June by-law, although good so far as the assuming of the roads was concerned, was bad for not specifying the particular portion of the same to be maintained by each municipality—"the undivided half" being too indefinite a description: that the October by-law, although good so far as the county being at the expense was concerned, was bad so far as the direction that the expense should be borne by the two municipalities of Williamsburgh and Morrisburgh: that the counties had no power to direct how these moneys should be provided; they had the power only to say how much should be furnished by the municipalities, but the mode of providing that money rested with the municipalities which were the contributors.

ADAM WILSON, J.—The clauses of the statute applicable to the case are sec. 339, which enact, among other provisions, "That the county council shall have exclusive jurisdiction over all roads and bridges lying within any township of the county; and which the council by by-law assumes as a county road or bridge, until the by-law has been repealed by the council, and over all bridges across streams separating two townships in the county," &c.

Sec. 340 enacts that "where a county council assumes by by-law any road or bridge within a township as a county road or bridge, the council shall, with as little delay as reasonably may be, and at the expense of the county, cause the road to be planked, gravelled, or macadamised, or the bridge to be built in a good and substantial manner."

Sec. 342 confers power on the council of any county to pass by-laws for a variety of purposes relating to roads; and among such purposes, in sub-section 8, "for requiring that the whole or any part of any county road shall be opened, improved, and maintained by any local municipality within the county."

The counties council having assumed the road in question, under sec. 339, as a county road, have directed the work to be done by and at the expense of the local municipalities, under sec. 342, sub-sec. 8. In truth, the counties council have apparently assumed the road for the purpose of compelling the local municipality to do the work at their own expense, which the counties have ordered to be done; and the question is whether this can be done, and sec. 340 be entirely passed over, which appears to have been enacted for the express purpose of meeting such a case as the present.

It would seem to be reasonable when a county council assumes by by-law the exclusive jurisdiction over any road or bridge lying entirely within a township as a county road or bridge, that the council should be compelled to improve and sustain it at the expense of the county, which is just the very direction which the statute makes, otherwise there can be no sense or purpose in the township being divested of the jurisdiction over its own internal roads.

But to hold that section 340 can be wholly ignored, as has attempted to be done in this case, is to repeal the provision which has been properly introduced for the regulation of those highways where the general county interest may be supposed to predominate over the special local interest, and in which therefore the general interest should prevail, but upon the usual terms, that what has been devoted to or taken for the general purpose shall be paid for and

supported at the like general expense. To cast the burden upon the special locality, and to make it provide for the whole general advantage where it has no power or jurisdiction, and its only privilege is to pay under the dictation of another power, would be as onerous and unreasonable an obligation as could well be conceived, and one which I am not inclined to establish, unless I am absolutely obliged to do so by the plain and unequivocal language of the law.

It may however be asked whether the 8th sub-section of section 342 is not so plainly and unequivocally worded as to justify this by law. I answer that although it may not be altogether so easy to say *what* county roads the sub-section does or does not include, for it is as comprehensively expressed as it well could be, yet I am of opinion, according to the general provisions of these sections, that the county cannot by by-law assume a road or bridge lying wholly within a township as a county road or bridge, and compel the local municipality or municipalities at the sole expense of such place or places to improve such road or bridge. This is an expenditure which must be borne by the county. But if it can do so, sub-section 8 gives no power to the county council to pass the by-laws imposing rates. This is at all events a right which still rests with the local municipalities.

This objection disposes of both by-laws; for while the first one directs that the expense shall be borne by Williamsburgh and Morrisburgh, the second one directs how the expense shall be apportioned. The one cannot fail without defeating the other.

I think also the first by-law is objectionable for the indefiniteness of the burden which is sought to be imposed upon these local municipalities.

The direction to keep in repair and support the undivided one-half of the roads by each of the named municipalities is not such a specification as will enable each one to know what particular portion or portions is or are assigned to each. They may differ about it, and who is to settle it? At present it is not known where the one-half is to begin or the other to end, or whether each half is to be

a continuous and connected portion or broken and separate parcels; and it may be that one-half of the extent may be far more or far less, according to the nature, quality, or character of the soil and ground, than one-half of the expense. Such an interest as this in land would require partition to be made of it, to reduce the particular share to a separate and certain unity.

The second by-law should not have directed how the municipalities that are to furnish the money should procure it. With this I think the counties have nothing to do. So long as the money would have been forthcoming, that is all the counties can concern themselves about. The mode of its being procured they have no voice in, or control over. The municipalities may borrow the money if they please, instead of levying it by a rate, or they may have the funds already in hand, and be prepared to pay it over, yet this by-law gives them no choice of determining upon what does alone concern themselves; and although I should have been loth to give effect to this objection if this had been the only one to the by-law, I feel that it is an objection, for it is an assumption of power by the counties which the local municipalities are entitled as a right to resist. The 5th sub-section of section 342 has no bearing on a case like the present.

I therefore think that so much of these respective by-laws as are sought to be quashed by the rules should be quashed, with costs.

The late Chief Justice of the court, before whom this case was argued, concurs in this decision, on the grounds that the by-law should have defined specifically what part of the road each municipality should improve; and that if the county had the power to cast the burden upon the local municipalities, the rates should at all events have been left to them to provide.

Rules absolute.

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## DICKSON V. MCFARLANE ET AL., EXECUTORS OF DONALD MCFARLANE.

*Secondary evidence.*

*Held*, that upon the evidence set out below there was no sufficient proof of the execution of the lease under which defendants claimed to let in secondary evidence of it.

EJECTMENT.—The defendants admitted the plaintiff's *prima facie* title, and set up title under G. B. Hall, through whom the plaintiff claimed.

The question was whether the evidence which was given at the trial was sufficient to let in secondary evidence of the contents of the lease under which the defendants claimed.

The case was tried before *Hagarty*, J., at Peterboro', when a verdict was rendered for the plaintiff.

The evidence, so far as it bore upon this question, was as follows :—

*Donald McVicar* said: "I came here in 1849. I lived with McFarlane, the testator. I had charge of his store. He had an oatmeal-mill. I had access to all his papers. I saw a lease of the mill in his house. He handed me the lease. I read part. I don't remember if it was or was not executed. He leased thereby for twenty-one years from Hall. At the end of seven years Hall could take the premises back, paying tenant for improvements; at fourteen years the same thing; at end of twenty-one years Hall was to get improvements to £150 at a valuation, and tenant might remove all the rest; other conditions as to water. It was some time after I came I saw it first, nine years ago; I think I saw it in 1852. I saw it afterwards. In 1855 a change was made in the machinery. The tenant wanted to change the form of lease, but it was not done. In 1857 Hall called at McFarlane's store; Hall told me when he called to ask McFarlane to go down to see him, and bring the lease with him. I told this to McFarlane. I saw him start to see Hall. (McFarlane the testator died on the 25th of December, 1857.) Since McFarlane died I paid rent for the executors to the plaintiff, also to Mr. Dennistown; no rent paid except mentioned in the receipts. The last receipt is the 1st July,

1860, for \$50, half a year's rent of oatmeal-mill to that day. The lease made it payable half-yearly. I have searched for the lease among the papers of deceased, but could not find it."

On cross-examination the witness said: "I found the paper produced in Burnham's writing, an account for drawing a lease. I don't think the lease was in Hall's handwriting. I am sure of this."

*Donald McFarlane*, a son of the deceased, said: "I went with my father to Hall's in July, 1857. My father went into the house, I stayed in the buggy. I saw no paper."

*John Hall*, father of G. B. Hall, deceased, said: "I looked through all his papers after his death; found no lease. I was once present, between 1847 and 1849; McFarlane agreed to give £25 for privilege of the water, and get a lease for fourteen years, and then be paid for improvements."

*E. M. Hall*, widow of G. B. Hall, deceased, said: "I have searched among his papers; could not find lease. I remember McFarlane coming with the boy. I asked Hall what he came for. He said about the lease of the oatmeal-mill."

It was admitted that notice to quit was given. The following exhibits were put in by the defendants:—

"My dear Sir,—I have to go to Toronto to-day, and expect to return this day week. Make me an offer for the flouring bolt. Give what is fair and we may deal, though upon the distinct understanding that you neither grind grists nor swap flour for them. Will fix the lease on my return.

Yours very truly,

GEO. B. HALL,

MR. D. MCFARLANE.

7th Dec., 1855."

"£12, 10s. Paid me by Donald McFarlane, twelve pound ten shillings, being half a year's rent up to 1st July, 1857, for oatmeal-mill held by him, on property of Harman, Cameron, and Dickson.

Dated 4th August, 1857.

ROBERT DENNISTOWN."

"Paid me for the executors of Donald McFarlane, by the hands of D. McKellar and Cameron, fifty dollars, for six months' rent due on the 1st instant for grist-mill, held from Harman and Dickson.

ROBERT DENNISTOWN.

Dated 9th July, 1859.

Per JAMES G. DENNISTOWN."

\$50, 00c.

PETERBOROUGH, January 1, 1860.

Received from Mr. McKellar the sum of fifty dollars in full for rent of the oatmeal-mill on the Hall property, owned by Mrs. McFarlane.

SAMUEL DICKSON.

PETERBOROUGH, 24th January, 1860.

To the Executors of Donald McFarlane. Gentlemen,—I beg to inform you that I have purchased from Messrs. Harman and Cameron their share of the Hall property in Peterborough, and that I alone am entitled to receive the rents due, or any future rents that may become due from you.

I am, your obedient servant,

SAMUEL DICKSON.

PETERBOROUGH, July 1, 1860.

Received from Mrs. McFarlane the sum of fifty dollars, being one half-year's rent for the oatmeal-mill due this day.

\$50, 00c.

SAMUEL DICKSON.

It was objected by the plaintiff that there was no evidence of the lease—no proof of execution by Hall, nor of any existing demise. The learned judge inclined to think the evidence insufficient, but to save a new trial he left it to the jury, and reserved leave to the plaintiff to move to enter a verdict for him, if the court should think there was no sufficient evidence.

Mrs. Hall being recalled said: "Mr. Dickson, the plaintiff, searched in Hall's papers last summer. He found nothing. I found a paper produced. It purports to be a lease unexecuted, no seal or signature, dated in 1850.

The jury found a verdict for the defendants.

*Read*, Q. C., obtained a rule to enter a verdict for the plaintiff pursuant to the leave reserved. He cited *Tay. Ev.* 390; *Brindle v. Woodhouse*, 1 C. & K. 647; *Cooper v. Gibbons*, 3 Camp. 363; *Doe dem. Wood v. Norris*, 12 East, 137; *Doe dem. Mather v. Whitefoot*, 8 C. & P. 270; *Sadlier v. Biggs*, 4 H. L. Cas. 435; *Cleave v. Jones*, 7 Ex. 425;

Everingham v. Rowndell, 2 Moo. & Rob. 138; Tyrwhitt v. Wynne, 2 B. & Al. 554; Gough v. McBride, 10 C. P. 166; Boyle v. Wiseman, 1 Jur. N. S. 894; Fox v. Culpepper, Skin. 673; Goodier v. Lake, 1 Atk. 446.

*Albert Prince* shewed cause during last term.

ADAM WILSON, J.—This blank lease from Hall to McFarlane is expressed that Hall doth demise and lease unto McFarlane all that certain parcel of land, &c. &c., *now in the possession of the said Donald McFarlane* for twenty-one years from the 1st of January, 1849.

This draft lease provides for the determination of the lease at the end of fourteen years, but not at the end of seven, as spoken of by the witness; and it speaks of McFarlane at the determination of the lease having the right to remove the machinery of the oatmeal-mill, and Hall paying to him not exceeding £200, as the mill and kiln shall be valued at; not £150, as the witness said.

It is to be inferred from the evidence and documents, as I believe the fact is, that McFarlane erected the oat-mill himself, for he has power on the determination of the lease to remove all the machinery, but Hall is to pay him for the building itself, not however exceeding £200.

It is therefore of much consequence to the defendants, and probably more to them than it is to the plaintiff, whether this is a continuing lease to the end of the twenty-one years from the 1st of January, 1849; for while the plaintiff may by the continuance be receiving only the \$100 yearly rent, he may still be receiving all he believed he was entitled to when he bought Mr. Hall's right, and perhaps for several years afterwards; he will be losing what may be an unexpected advantage, which he never bargained for, while the defendants will be losing the profits which it would rather appear as a fact their testator did in truth bargain for, if they do not altogether forfeit their right to the removal of the machinery, and to compensation for the building by reason of the want of due proof of their title, or by their contestation of the plaintiff's title and right, and the non-removal of such articles within the proper time.

The rights, however, of the respective parties must be determined by law, without regard to the hardship or peculiarity of the case of either of them, for these are considerations which cannot make law what is not law, and we have only to pronounce not to make the law.

The general rule is that before secondary evidence can be given of a deed alleged to have been made, which is said to be lost or destroyed, it must be first shewn that such a deed was in fact made. See Taylor on Evidence, 3rd ed., p. 390, and the authorities there cited; and also *Arbon v. Fussell*, (7 L. T. Rep. N. S. Ex. 283.) Now what evidence was there in this case of the existence of an actual lease to pass an interest in land?

The following is nearly the whole of the evidence which was given at the trial: Donald McKellar says he lived with McFarlane in 1849, and it would appear until at or about the time of his death, in the end of 1857: that in 1852 and 1855 he saw the lease from Hall to McFarlane, and read it, but notwithstanding that *he cannot remember if it was or was not executed*. Hall, in 1857, left a message with this witness for McFarlane to go to Hall's, *and bring the lease with him*.

This witness states what he thinks were the terms of the lease he read; but if the terms be the same as those which are contained in the draft lease produced by Mrs. Hall, it is clear there are several very important differences between the supposed lease and the draft lease, or between the witness' recollection and the lease he speaks of, or between his recollection and the draft lease, shewing how very uncertain and dangerous it is to depart from the strict line of proof which the law has wisely required to be given in such cases.

This witness' testimony, I think, does not afford the necessary evidence of there having been a lease in fact to permit of secondary evidence being given of the contents of the supposed lease.

Then the evidence of John Hall advances it no further. He says he was present at a conversation between George B. Hall and McFarlane, between 1847 and 1849, when McFarlane agreed to give £25 for privilege of the water,

*and get a lease for fourteen years, and then be paid for improvements.* Now if the draft lease be any kind of evidence, it appears that in 1850 McFarlane had not then got a lease at all, although he was then (that is, in 1850) in possession of the property, and that the lease he was to get was to relate back to the 1st of January, 1849.

The lease this witness speaks of McFarlane having got *for fourteen years*, is not the lease the defendants assume to claim under, and therefore it must be presumed that such a lease as one for fourteen years was never given; if in fact it had been given, the term would be now determined.

Mrs. Hall's evidence is of no consequence, excepting as to the draft lease which she produces, but there is no proof that such a lease as the terms of this draft contain was ever acted upon. It corresponds in rent and in the duration of term with the verbal testimony of Donald McKellar, but it differs in other important particulars. This draft, therefore, is not confirmed as containing the bargain said to have existed between the parties, but if it were it would be the confirmation of a draft only, and a draft coming from the custody of the lessor would be very cogent evidence, in the absence of any actual lease being proved, that no such lease had in fact ever been made, for certainly the landlord is quite as much interested in the completion of a perfect title of assurance between himself and his lessee as the lessee himself could be.

The evidence then so far does not, I think, afford such presumption in the defendant's favour of there having been a lease actually executed as to let in secondary evidence of the contents of such supposed lease.

The only remaining portion of the evidence to be considered is what is contained in the above exhibits. The words, "will fix the lease on my return," contained in Mr. Hall's letter of the 7th of December, 1855, would rather prove, if they prove anything, that no lease had then been executed, for it is scarcely the language which would be used with regard to a perfected document. The expression *lease* does not mean a lease for any particular term, nor that it is in writing. It does not in any respect aid the defendants.

I have given full consideration also to the receipts for rent put in, and particularly to the one containing the expression "owned by Mrs. McFarlane;" but I am unable to extract from them anything which would not as readily accord with the tenancy being from year to year only, or not in writing, as with the presumption which the defendants desire to be drawn of their having a written lease for the term of twenty-one years.

I am therefore compelled to decide for the plaintiff, and to hold that the learned judge was correct at the trial in the opinion which he gave, that sufficient evidence had not at law been given of the actual existence of a lease to permit of secondary evidence being given of the contents of a supposed lease.

The rule must therefore be made absolute to enter a verdict for the plaintiff, and in this judgment I am authorised to say that the late Chief Justice of the court concurs.

Rule absolute.

### IRVING V. HAGERMAN ET AL.

*Collision—Both vessels carrying wrong lights—Right to recover for cargo.*

In a case of collision, it appeared that both vessels were carrying the lights prescribed by the 14 & 15 Vict., ch. 126, although that act had been repealed three years before by the 22 Vict., ch. 19, which required other lights, and in different places.

*Held*, that as the error was common, and neither therefore could have been misled by it, the case must be treated as if both were carrying the proper lights.

*Held*, also, that the owner of the vessel not in fault might recover the value of goods on board, not owned by him but in his custody as a carrier.

THE plaintiff, as owner of the schooner "Lively," sued defendant, as owner of the schooner "Royal Albert," for a collision, by which his vessel, with a cargo of wood and other goods on board, was sunk.

*Pleas*, not guilty, and that the injury was caused by the negligence of the plaintiff, and not otherwise.

At the trial, at Toronto, before *Draper*, C. J., it appeared that both vessels were carrying the lights prescribed by the 14 & 15 Vict., ch. 126, although that statute had been

repealed and different lights directed, by the 22 Vict., ch. 19, some years before the accident, which took place on the 24th of October, 1862. The plaintiff's vessel had at the time a quantity of wood on board, not belonging to the plaintiff, but being carried by him from Port Hope, as a carrier for one Tinning.

It was objected that the plaintiff's vessel not having the proper lights required by the statute then in force, he was prevented by this neglect from recovering; and that he could not claim for the loss of the wood, in which he had no property except as carrier.

The learned judge directed the jury that both vessels being equally in fault as to the lights, neither party could have been deceived, and that the case therefore must be treated in this respect as if both had exhibited the proper lights. The value of the vessel was assessed at \$2000, and the wood at \$234, and a verdict was found for the plaintiff for \$2234, leave being reserved to the defendants to move to reduce it by the \$234.

*C. S. Patterson* obtained a rule *nisi* to reduce the verdict pursuant to leave reserved, or for a new trial for misdirection, and the verdict being contrary to law and evidence.

*J. H. Cameron*, Q. C., and *Harman*, shewed cause, and cited 14 & 15 Vict., ch. 126; 22 Vict., ch. 19; Consol. Stats. C., ch. 44; *Morrison v. General Steam Navigation Co.*, 8 Ex. 733; *Shaw v. DeSalaberry Navigation Co.*, 18 U. C. R. 54; *The Panther*, 17 Jur. 1037, S. C. 24, Eng. Rep. 585; *The Lady Anne*, 15 Jur. 18, Adm., S. C., 1 Eng. Rep. 670; *The General Steam Navigation Co. v. Mann*, 14 C. B. 127, S. C., 26 Eng. Rep. 339; *Vennall v. Garner*, 1 Cr. & M. 21; *Davies v. Mann*, 10 M. & W. 546; *Collinson v. Larkins*, 3 Taunt. 1; *Brown on Actions at Law*, 203; *Broom on Parties to Actions*, 223; *Add. Torts*, 291; *Brown v. Hodgson*, 4 Taunt. 189; *Rooth v. Wilson*, 1 B. & Al. 59; *Martini v. Coles*, 1 M. & S. 147; *Freeman v. Birch*, 1 N. & M. 420; *Nicolls v. Bastard*, 2 Cr. M. & R. 659.

*C. S. Patterson*, contra, cited *The Aliwal*, 18 Jur. 296

Lawson v. Carr, 10 Moo. P. C. C. 162; Morgan v. Sim, 11 Moo. P. C. C. 307; Gildersleeve v. Bonter et al., 12 U. C. R. 489; Tuff v. Warman, 2 C. B. N. S. 740; Mayne on Damages, 156; Abbott on Shipping, 468, 472; Maude & Pollock on Shipping, 402, 409.

ADAM WILSON, J., read the following judgment prepared by

HAGARTY, J.—I have read the evidence and the very full note of his charge by the learned Chief Justice of the Common Pleas.

I think there is no ground for interfering on the merits, and also that the case went fairly to the jury.

It remains to consider whether the value of fifty cords of wood on board the plaintiff's schooner, the property of another person, is recoverable in this action. The evidence merely shews that the plaintiff was the carrier of the wood, it being the property of one Tinning.

I have felt some surprise at the small amount of authority to be found on this point. The question is generally dismissed with the general allegation, such as is found in Abbott on Shipping, 8th ed., p. 240, "But an action may be maintained by the owner of goods lost or damaged by collision against the owners of the vessel which can be proved to have been in fault;" and in the case of "The Cumberland," 5 L. T. Rep. N. S. 496, "An action always lay at common law on the part of owners of goods lost or damaged by collision against the owners of the wrong-doing vessel."

The practice seems almost universally to be for the owners of the goods to make their own claims for redress, either in the common law courts or in Admiralty, against the offending vessel. The carriers are generally protected by their bills of lading against the freighters, collision being a loss thereby guarded against.

But we have now to determine whether the plaintiff, having charge of Tinning's wood, of which he was the carrier, and in the absence of any proof as to the nature of his liability to him, or if such liability were in any way restricted, had not such a property in the goods as to entitle him to recover.

The defendants have given us no evidence explanatory of the plaintiff's position in relation to Tinning. We simply know the plaintiff as the bailee of Tinning's goods, lawfully in his charge as a carrier.

I do not see my way to any other conclusion on this evidence, than that the plaintiff had such a possession and special property in the wood as to entitle him to recover its value against a wrong-doer.

In *Rooth v. Wilson* (1 B. & Al. 59) the gratuitous bailee of a horse was held entitled to recover its value against defendant for a defect in his fence, whereby the horse feeding in the plaintiff's close fell through and was killed. Lord *Ellenborough*, C. J., and *Bayley*, *Abbott*, and *Hobroyd*, JJ., concurred in holding his possessory interest sufficient to enable him to recover the value.

In *Nicolls v. Bastard*, (2 Cr. M. & R. 660,) *Parke*, B., says: "I think you will find the rule is, that either the bailor or bailee may sue, and whichever first obtains damages it is a full satisfaction."

*Crowley et al. v. Cohen* (3 B. & Ad. 478) was a case in which the owner of barges plying on a canal, carrying goods for various persons, insured £1000 on the goods and boats. One of the plaintiff's boats was sunk with goods of several persons on board, and the plaintiff had to make compensation to the owners. It was chiefly objected that the policy did not cover the plaintiff's interest, since it purported to protect goods against the usual risks to which the owners of goods were liable, whereas the loss alleged was one arising out of the plaintiff's liability as carrier to risks to which carriers are liable.

*Littledale*, J., says: "Goods in the custody of carriers are constantly described as their goods in indictments and declarations in trespass. The plaintiffs here were liable in particular cases for the loss of the goods they carried, and had a special property in them on that account. The goods were, for the present purpose, their goods."

*Parke*, J.: "It is admitted here that the plaintiffs had some interest which they might insure; it was that, in fact, which carriers ordinarily have."

*Patteson, J.*: "It is an assurance upon goods in which the assured has a special interest."

I think the plaintiff shewed a *prima facie* right to recover the value of goods lawfully in his vessel at the time of collision; and it was for defendants to rebut such *prima facie* case, if they could, by proving the existence of facts inconsistent with such right.

Had defendants forcibly taken this wood from the plaintiff's vessel while lying at Port Hope wharf, I have no doubt the plaintiff had sufficient property in it to have maintained trespass. I am unable to see any sound distinction between such an injury and the destruction or loss of the wood by defendants wrongfully running down the plaintiff's vessel in which the wood was carried.

I think the verdict must stand.

ADAM WILSON, J.—The singularity of this case is that both sailing vessels were at the time of the accident carrying the lights required by the 14 & 15 Vict., ch. 126, although that act had been repealed by the 22 Vict., ch. 19, which required other lights, and required them to be exhibited in other places, more than three years before the collision; yet both of the masters are mariners, and yet ignorant of the commonest but most material information of their calling—the knowledge, I may say, of "the rule of the road."

It is quite obvious, then, that if either of the vessels had been carrying the proper statutable lights, such lights would have misled the master of the other vessel that was still sailing under the old repealed lights; and it is quite clear, too, that both vessels being wrong is just precisely the reason why neither of them was deceived.

This case, then, must for all practical purposes be considered just as if the two vessels had been carrying the proper lights, instead of both of them, as the fact was, carrying improper lights: it was a common and equal error.

From the statement of facts already made, I entertain no doubt that the finding of the jury was quite right, and that the charge of the learned Chief Justice was just the charge with regard to the lights which he was bound to deliver to

the jury:—that there being a common error, and no misleading of either by the lights of the other, so that in fact the kind of lights which was carried had nothing to do with the act complained of, the plaintiff was entitled to recover upon the jury finding other necessary facts in his favour, notwithstanding he was at the time exhibiting such lights as were not warranted by law.

The cases cited of *Morrison v. The General Steam Navigation Company*, (8 Ex. 733 ;) *The Panther*, (17 Jur. 1037 ;) *Shaw v. The De Salaberry Navigation Co.*, (18 U. C. R. 541,) and many other cases, quite sustain the correctness of this charge.

Upon the question of freight, however, much difficulty has been entertained. At the time the plaintiff's vessel was run down, she had on board fifty cords of firewood, the property of one Tinning, and the learned Chief Justice directed the jury they might find for the plaintiff for the value of this property, although he was but the carrier and not the owner of it, and the jury accordingly gave the plaintiff an additional sum of \$234 for the wood.

The defendant now moves against the verdict for misdirection in this particular.

It is well settled that a gratuitous bailee may maintain an action for a trespass or an injury done to the property while in his bailment. *Rooth v. Wilson*, (1 B. & Al. 59 ;) per Lord *Ellenborough*, C. J., in *Martini v. Coles*, (1 M. & Sel. 147 ;) *Freeman v. Birch*, (1 N. & M. 420 ;) *Nicolls v. Bastard*, (1 Tyr. & G. 156.)

As between the owner and the freighter a collision is an accident of the sea, within the usual condition of the charter-party, and therefore the owner is not liable to the freighter for the loss of his goods, when the vessel is run down by accident: *Abbott on Shipping*, (10th ed. 529 ;) *Buller v. Fisher*, (3 Esp. 67 ;) *Price v. Noble*, (4 Taunt. 123.)

The owner of the ship would be liable, however, if he had acted negligently ; so would the owner of the other vessel if in fault: *The Cumberland*, (5 L. T. Rep. N. S. 496 ;) *Buller v. Fisher*, (3 Esp. 67 ;) *Abbott on Shipping*, (6th ed. 209.)

I have looked at the references given to us by Mr. Patter-

son, but none of them at all lessen the plaintiff's claim to a recovery when the non-compliance with the strict statutory regulations had no effect or operation in inducing the collision in the remotest degree.

Nor do I find any authority whatever making any distinction between a case of the owner of a ship or of the owner of goods on board, of which the former is the carrier and bailee, and the case of any other bailee, shewing that the one can maintain an action against a wrongdoer while the other cannot; that is, making any distinction between a bailee by land and a bailee by water. There seems none whatever in principle, and therefore the recovery for such goods by this bailee ought to stand, the effect of which will be that the defendant is discharged as to all further accountability in respect of the same goods to the actual owner of them.

I am authorised to say that the late Chief Justice concurs in this judgment.

Rule discharged.

## THE PRINCIPAL SECRETARY OF STATE FOR WAR V. THE CORPORATION OF THE CITY OF TORONTO.

*Assessment—Property held for the Crown—Exemption—Consol. Stats. U. C., ch. 55, sec. 9.*

*Held*, affirming *Shaw v. Shaw*, 12 C. P. 456, that land leased to a commissariat officer on behalf of the Secretary of State for War, and occupied by Her Majesty's troops, was exempt from taxation; and that a provision in such lease binding the lessee to pay all taxes to which the premises should be liable could make no difference; but

Where such land before the execution of the lease had been assessed to the lessor for that year, *Held*, that it was not discharged, but that as payment could not be enforced from the Crown, and the officer had paid to the collector under protest, the money might be recovered back.

### SPECIAL CASE.

THIS is an action brought by the plaintiff against the defendants for the recovery of the sum of \$285; and by the consent of parties, and by the order of the Honourable Mr. Justice *Morrison*, dated the 15th of May, 1863, according to the Common Law Procedure Act of 1856, the following case has been submitted for the opinion of the court, without any pleadings.

1st. During the year 1862 certain premises situate on

King street, in St. George's Ward, in the city of Toronto, more particularly described in the paper writing or indenture of lease hereunto annexed marked A., were occupied by Her Majesty's troops as barracks under and by virtue of said lease. Said premises were during the said year assessed upon the assessment roll for St. George's Ward at the annual value of \$800, a copy of said assessment roll, so far as the same relates to the said premises, being hereto also annexed, marked B. That in January of the year 1863, the collector called upon the commissariat officer in charge at Toronto for the payment of the sum of \$150 for taxes on said premises for the year 1862, said officer refusing to pay said taxes on the ground that the premises were not liable to taxation. On a subsequent occasion the above amount was paid to said collector under protest.

2nd. Also during part of the year 1862, certain other premises, situate on Front street, in St. George's Ward, in the said city of Toronto, more particularly described in the paper writing or indenture of lease hereunto annexed, marked C., were occupied by Her Majesty's troops as a hospital, under and by virtue of said lease. Said premises were during said year 1862 assessed upon the assessment roll for St. George's Ward, at the annual value of \$600, a copy of which assessment roll, so far as it relates to said premises, is hereunto annexed marked D. That in January, 1863, the collector applied to the commissariat officer in charge at Toronto for the sum of \$135 for taxes on said premises for the year 1862, which amount was also paid under protest.

The questions for the opinion of the court are:—

*First.*—Whether under the circumstances mentioned in part one of the above statement, and in the papers A. and B. hereto annexed, the said premises therein mentioned were “vested in or held by Her Majesty, or officer or person in trust for Her Majesty,” in such a manner as to bring them within the exemptions from taxation under Consol. Stats. U. C., ch. 55, sec. 9.

*Second.*—Whether under the circumstances mentioned in part two of the above statement, and in the papers C. and D. hereto annexed, the premises therein mentioned were vested in or held by Her Majesty, or officer or person in trust for Her Majesty, in such a manner as to bring them within the exemptions from taxation under Consol. Stats. U. C., ch. 55, sec. 9.

If the court shall be of opinion in the affirmative in both cases, then judgment shall be entered up for the plaintiff for \$285 and interest, and costs of suit.

If the court shall be of opinion in the affirmative in only one of the above cases, then judgment shall be entered up for the plaintiff for the amount of taxes paid in such case and costs.

If the court shall be of opinion in the negative in both said cases, then judgment of *nolle prosequi*, with costs of defence, shall be entered up for the defendants.

The lease A. above referred to was from George Desbarats to "William Lemesurier, Deputy Commissary-General, acting on behalf of the Secretary of State for War," dated 16th August, 1861, of certain lands particularly described, on the corner of King and Dorset streets, from the 14th of August, 1861, to the 30th of April, 1862, renewable from year to year on three months' notice being given for a period of three years, at the yearly rent of £200, payable quarterly. It contained this clause: "The said lessee on his part being held to the payment of all taxes or assessments whatsoever to which the said premises shall be liable during these presents." This lease was executed by the lessee thus, "for and on behalf of Her Majesty's Secretary of State for War, WILLIAM LEMESURIER," and by the lessor.

The following is the paper referred to marked B. :—

ST. GEORGE'S WARD, CITY OF TORONTO, 1862.

Names of Taxable Parties.				Value and description of Real Property.				
1	2	3	6	7	8	9	13	17
No.	Occupant.	Profession.	Owners.	Profession.	F. or L.	Description and extent of property, street, square, or other description, number of acres, feet, &c.	Total annual value of Real Property	Total annual value of Real & Personal Property or Income.
193	William Lemesurier.	Deputy Com. Gen.	George Desbarats.	Queen's Printer.	F.	Brick 28 × 110.	\$800	\$800

The lease marked C. was made, in pursuance of the act respecting short forms of leases, on the 10th of March, 1862, by William Willcocks Baldwin to "Frederick H. Waldron, Assistant Commissary-General, acting for Her Majesty, her successors and assigns," of land at the corner of Bay and Front streets, for two years from the 10th of March, 1862, at £200 a year, payable quarterly. It contained a covenant by the lessee "to pay taxes," but was executed by the lessor only.

The following is the paper above referred to marked D. :—

ST. GEORGE'S WARD, CITY OF TORONTO, 1862.

Names of Taxable Parties.			Value and description of Real Property.				
1	2	6	7	8	9	13	17
No.	Occupant.	Owner.	Profession.	F. or L.	Description and extent of property, street, square, or other description, number of acres, feet, &c.	Total annual value of Real Property.	Total annual value of Real & Personal Property or Income.
543	Vacant House.	William W. Baldwin.			Brick 52 × 208.	\$600	\$600

The case was argued during last term.

*A. Kirkpatrick*, for the plaintiff, cited *Shaw v. Shaw*, 12 C. P. 456.

*Galt*, Q. C., contra.

The statutes referred to are cited in the judgment.

ADAM WILSON, J.—The first case, relating to the land on King street, is concluded by the judgment of our own Court of Common Pleas in *Shaw v. Shaw*, (12 C. P. 456,) unless the covenant by the lessee to pay “all taxes or assessments to which the said premises shall be liable” during the lease, can make any difference; but I think this engagement cannot be binding on the Crown.

The statute expressly exempts this property from liability to taxation; probably this would have been the law if no such provision had been made.

The Crown cannot be prejudiced in its rights by the acts of any of its officers, (*Chitty's Prerog.* 347; *Sheffield v. Ratcliffe*, *Hob.* 347.) Nor can the court decree against a title appearing on the record in the Crown, though not insisted on at the hearing, (*Barclay v. Russell*, 3 *Ves.* 424.)

The second case is somewhat different from the first, in that it was rightly assessed to Mr. Baldwin, the lessor, when it was assessed, but it became by the subsequent demising to and occupation of it as above stated exempt from taxation at some time. The question is at and from what time. Is it from the beginning of that municipal year, or from the time

of the making of the lease, or is it only from the expiration of that year?

If it appeared that the assessment had become final by the lapse of time without notice of appeal having been given before the making of the lease, that might simplify the question, for if it were still inchoate when it passed to the Crown it could not become perfected afterwards; but if the time for appealing had gone by before the demise to the Crown, there would seem to be no reason why the owner, who was rightly assessed, and the land, so far as he is concerned, should not be bound for the assessment in like manner as he would have been, and the land also, for a prior year's unpaid assessment when it was entirely in his own hands.

The statute does not say that the land which has once been charged with an assessment shall become discharged of it when and because it comes into the possession of the Crown. It says merely that property vested in or held by Her Majesty, &c. &c., shall be exempt from taxation—that is, shall not be liable to taxation or be taxed—which is quite a different thing from acquitting such lands from liability which have already been taxed when in private hands. All taxes are by Consol. Stats. U. C., ch. 55, sec. 107, declared to be a special lien on the land, and to have a preference over any claim of any party except the Crown, which means that any existing Crown claim on land shall not be prejudiced by subsequently accruing assessments upon it, but it never can be contended to mean that the special existing lien of assessments shall be postponed to or defeated by the subsequently acquired title of the Crown.

Even lands in which the Crown is still interested, such as are under lease, &c. &c., to a subject, may be assessed, and may be sold for non-payment of taxes, subject however to the Crown rights, (Consol. Stats. U. C., ch. 55, sec. 138, and also 23 Vict., ch. 2, sec. 27.)

While, therefore, the property of Her Majesty cannot be taxed so long as it is Her Majesty's property, the property which has rightly been taxed when in the ownership of a subject continues liable to such taxation, notwithstanding it

may afterwards come to the hands of Her Majesty, although it may not be liable to all the remedies for the recovery of such taxes so long as it is in the possession of the Crown, for the Crown cannot be distrained upon, (Vin. Abr., Distress D. 2, Pl. 6, D. 3, Pl. 3, 4, 5, 6; Claydon's Landlord and Tenant, 247,) nor sued in the ordinary manner.

I am therefore of opinion the land secondly mentioned is not shewn to have been wrongly assessed: that the collector had the authority to apply to Her Majesty's officer in custody of the property for payment of the taxes, not as a claim due by Her Majesty, but as a charge existing upon the property, and to receive payment from such officer in possession if he chose to make it; but the collector had not the power to compel or enforce payment from the Crown, which it appears he did, as the money was paid under a protest against the rightfulness of the demand, and against all liability in respect of such taxes.

I therefore answer both of the questions in favour of the plaintiff, though not altogether properly in the affirmative in the language in which they are expressed.

I am authorised to say that the late Chief Justice of the court concurs in the opinion which I have expressed.

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#### KENNEDY V. PATTERSON ET AL.

*Interpleader—Action against execution creditor—Evidence—Damages.*

IN an action against the execution creditors, by the claimant of the goods sold after the decision of an interpleader issue in his favour,

*Held*, 1. That the accepting and contesting the interpleader issue formed no evidence to make defendants liable for the previous seizure by the sheriff; and this having been left to the jury as tending to establish their liability, in conjunction with slight evidence of a direct order to seize, a new trial was granted without costs.

2. That for any loss sustained after the date of the interpleader order, (that is, in this case for the sale of the goods by the sheriff under value,) defendants were not liable.

TRESPASS *quare clausum fregit*, being lot No. 38, in the eighth concession of South East Hope, and took away the plaintiff's horses, cows, and goods, and converted them to his own use.

Second count, *de bonis asportatis*.

Third count, *quare clausum fregit*, being the same lot, and

deprived plaintiff of the use and possession thereof, and wrongfully took and deprived the plaintiff of the use and possession of his horses, &c., (as before,) and kept possession of the same, and of the premises, for six months, by reason whereof the plaintiff was greatly disturbed in the peaceable possession, and was prevented from carrying on his affairs.

Fourth count, in trover, for the same horses, &c.

Pleas, 1. Not guilty. 2. Goods not the plaintiff's. 3. To the first and third counts, that the lands therein mentioned were not the plaintiff's. Issue.

At the trial, at Stratford, before *McLean*, C. J., the facts appeared as follow: The defendants' attorney on the 26th of May, 1862, placed an execution in the hands of the sheriff of the county of Perth, against the goods and chattels of one David Blain. On the 11th of July following the goods in question were seized on a farm on which Blain's family were living. On the 18th of July the sheriff was served with a notice on behalf of the plaintiff, claiming the goods, &c., seized. On the 16th of August the goods were sold, excepting the crops, which were sold on the 5th of September, producing in all \$204, 12c. The possession money and sheriff's fees were deducted, and the balance, about \$168, was paid into court on the interpleader order, which was made by the judge of the County Court of the County of Perth, on the 5th of August, 1862.

By this order it was directed that on payment into court by the claimant of \$500, or on his giving security to the satisfaction of the clerk of the county court for that sum within four days from the service of the order, the sheriff should withdraw from possession under the *fi. fa.*; and that in the meantime, and until such security be given, he should continue in possession, and the claimant should pay possession money for the time he should so continue unless the claimant should desire the goods to be sold by the sheriff, in which case the sheriff should sell and pay the proceeds into court, after deducting the expenses and possession money from the date of the order, to abide further order. It was also directed that no action should be brought against the sheriff for the seizure.

On the 12th of August the claimant gave a written notice to the sheriff, desiring that the goods should be sold, and the proceeds paid into court, as directed by the interpleader order.

Before the seizure the bailiff to whom the sheriff had given a warrant to execute the writ heard that the plaintiff claimed these goods, and he so informed Mr. Lizars, the attorney for the now defendants, who were the execution plaintiffs against Blain, and asked him if he thought the bailiff had better seize. Mr. Lizars said he thought the bailiff had better seize, and the seizure was made. The bailiff stated in evidence that he was not aware of any further directions being given by Mr. Lizars or his partner, Mr. MacFarlane, respecting the seizure or the goods. The bailiff, with some exceptions, to no great amount, swore he thought the articles brought their value. He paid \$168, 32c. into court in pursuance of an order of court, and this sum was afterwards by order of court paid out to the plaintiff. The bailiff had possession of the articles seized about a month or five weeks.

On the trial of the interpleader issue, in which the now plaintiff was plaintiff and the now defendants were defendants, a verdict was rendered for the plaintiff that the property seized was his, and an order was made thereon that the defendants should pay the plaintiff his costs of the interpleader order, the sheriff's costs of obtaining the same, the costs of the issue tried thereunder, the costs of all proceedings therein and incidental thereto, including the plaintiff's costs as respondent in the Court of Common Pleas, and the possession money, charges, and expenses of the sheriff in seizing, keeping, and selling the goods.

The plaintiff, by lease dated 30th of January, 1862, leased all the cleared land on lot 38, in the sixth concession of South Easthope, and all the land which he, the plaintiff, might thereafter clear on the said lot, from David Blain, to hold for five years from the first day of January, 1862.

Mr. MacFarlane, the partner of Mr. Lizars, was examined, and swore that he did not know the defendants personally : that the suit of the defendants against Blain was brought by

Mr. Lizars and the witness: that he knew of no correspondence with the defendants: that the proceedings in the interpleader suit were carried on by Carrall and McCulloch as attorneys on one side, and Lizars and MacFarlane on the other, and that he, MacFarlane, acted as counsel at the trial of the interpleader suit; and a verdict being rendered for the plaintiff application was made for a new trial, which was refused, and the refusal was appealed against in the Court of Common Pleas: that he did not know of any authority from the defendants to defend the interpleader suit, but thought Mr. Lizars was so confident of succeeding that he defended it without consulting defendants on the subject: that the same person who as agent or book-keeper for the defendants employed Lizars and MacFarlane to sue Blain sent to them the writ which had been served on defendants in this suit, and on receiving it they appeared and defended.

It was objected that this was not enough to connect the defendants with the seizure of the goods and the interpleader suit. The learned Chief Justice held that it was sufficient to go to the jury.

It was sworn that the plaintiff was living on this farm when the seizure was made: that he put in the spring wheat and oats after he rented the place, and that David Blain had left it. The plaintiff was a brother-in-law of David Blain, whose wife and family were still living on the farm, the plaintiff living with them. The plaintiff gave evidence shewing that the property seized was worth much more than the bailiff valued it at.

It was objected for the defence that the evidence did not connect the defendants with the seizure or sale of the goods: that the counts for trespass to the realty were wholly unsupported against the defendants: that the sale of the goods was made at the desire of the plaintiff signified to the sheriff in writing, and put in and proved, and that such sale could not be deemed a conversion by the defendants, wherefore the count in trover failed; and that the defendants were not estopped from disputing the plaintiff's right to the goods.

The sheriff's bailiff was recalled at the close of the case, and added to his former evidence that he had heard of the plaintiff's claim to the goods, and asked Mr. Lizars as counsel for the sheriff to ascertain from him as such what course it would be proper for him to pursue, being aware at the same time that Mr. Lizars was attorney in the defendants' suit against Blain.

The learned Chief Justice left the case to the jury, who found for the plaintiff, with \$418 damages on the second count, and for the defendants as to the trespass to the land.

In Easter Term, *Anderson* obtained a rule *nisi* for a new trial, on the ground that there was no evidence to connect the defendants with the trespass; and that the damages were excessive, as the damages created by the sale of the goods were improperly allowed to be taken into consideration.

*C. Robinson*, Q. C., shewed cause in Trinity Term, citing *Park v. Taylor*, 1 C. P. 414; *Cotton v. Stokes*, 10 U. C. R. 262; *May v. Howland*, 19 U. C. R. 66; *Harmer v. Gouinlock*, 21 U. C. R. 260; *Stokes v. Eaton*, 3 C. P. 267; *Hollier v. Laurie*, 3 C. B. 334; *Booth v. Preston, &c.*, R. W. Co., 3. P. R. 90.

*Crooks*, Q. C., and *Anderson* supported the rule, citing *Wright v. Woollen*, 7 L. T. Rep. N. S. 73, 10 W. R. 715; *Wilson v. Tumman*, 6 M. & G. 236; *Walker v. Olding*, 7 L. T. Rep. N. S. 633, 9 Jur. N. S. 53; 4 Inst. 417; *Broom Leg. Max.* 781; *Eastern Counties R. W. Co. v. Broom*, *per Patteson*, J., 6 Ex. 327.

DRAPER, C. J., delivered the judgment of the court.

The first question is whether there was evidence to go to the jury to make the now defendants joint trespassers with the sheriff's bailiff in the original act of seizure of the plaintiff's goods (as the interpleader verdict determines them to have been) on the *fi. fa.* against the goods of Blain. We think the learned Chief Justice was right in not withdrawing the case from the jury on this point. The bailiff's evidence, as at first given, was sufficient to shew that before the seizure,

having heard of the plaintiff's claim, he went to Mr. Lizars, the attorney for the execution creditors, to ask him if he should seize, and was advised that he should seize. After the plaintiff's case was closed, he was recalled at the request of the defendants' counsel, and qualified the statement by saying he applied to Mr. Lizars as counsel for the sheriff. He does not say he told Mr. Lizars so, and it may be that Mr. Lizars gave his answer as attorney for the now defendants. Mr. Lizars might have been called, and then there could have been no doubt. Had the jury found against the plaintiff on this evidence, it would rightly have concluded him, but we are not prepared to say it ought not to have been submitted to the jury.

The defendants' subsequent conduct, assuming that they gave Mr. Lizars authority to represent them in the interpleader summons, would not, we apprehend, amount to a subsequent ratification of the bailiff's act so as to make them trespassers by his seizure. (*Wilson v. Tumman*, 6 M. & G. 236. See also *Wright v. Woollen*, 31 L. J. Ex. 513, 10 W. R. 715; *Walker v. Olding*, 9 Jur. N. S. 53.) This evidence was however submitted to the jury, as tending to shew that the defendants were liable from the fact that their attorneys in the original action represented them on the return of the interpleader summons and in the subsequent proceedings. We cannot say how far this may have influenced the minds of the jury on the question of previous authority, as to which the bailiff's evidence taken altogether afforded at best but slender proof.

It does not appear that the objection as to the damages was raised at the trial; but as we think there should be a new trial for the admission of the evidence to shew subsequent ratification, it becomes necessary for us to express an opinion on this point; and it appears to us to be settled by the case of *Walker v. Olding* that the plaintiff cannot recover damages against the execution creditor for any loss sustained after the date of the interpleader order.

The case of *Harmer v. Gouinlock* in this court has determined that the result of the interpleader issue is conclusive as to the plaintiff's right to the goods, though not replied as

an estoppel to the defendants' plea that they were not the plaintiff's.

The rule will, therefore, be absolute for a new trial without costs.

Rule absolute.

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THE BUFFALO AND LAKE HURON RAILWAY COMPANY V.  
HEMMINGWAY.

*Interpleader—Right to restrain an action against the execution creditor—  
Time for moving against order—Jurisdiction when goods owned by foreigner.*

*Held*, on the authority of *Carpenter v. Pearce*, 27 L. J. Ex. 143, that a judge has authority by interpleader order to restrain an action against the execution creditor as well as against the sheriff.

*Held*, also, that an application against such order was too late after the lapse of four terms, the affidavit of the claimant that he knew nothing of it until shortly before the term in which he applied being inconsistent with the statements of his counsel, and with other facts sworn to.

The rule that an order in Chambers must be moved against in the ensuing term applies even to orders made without authority.

The claimant, a resident of the United States, having placed the goods here, would have been personally liable to the jurisdiction of this court in any question concerning them, even if he had not employed an attorney and made an affidavit to support his claim.

IN Hilary Term, *W. H. Burns* obtained a rule, calling upon the plaintiffs to shew cause in the following term why the last two sections of the interpleader order in this cause, made on the 27th of December, 1861, by *Richards, J.*, to the effect following: "That the claimant be barred as to the goods seized by the said sheriff under the attachment in this cause in schedule A. hereto annexed;" and "that unless the claimant do give said security for the said costs of the said judgment debtors within the said thirty days, the said claimants be for ever barred as to the said goods and chattels mentioned in the said schedule A."—should not be rescinded, and such order be so far varied, and be as if no such provisions were therein, or the same be so far varied as only to bar the claimant therein mentioned as against the sheriff, his officers and servants, in respect of the goods seized and referred to in the order—on the ground that the judge had no authority to make such order, or to bar the claimant except as against the sheriff obtaining the order

in respect of the goods mentioned, and had no authority to bar the claimant as against the plaintiffs, and to prevent him from recovering damages against them or any one else except the said sheriff; and on grounds disclosed in affidavits and papers filed in Chambers when such order was made.

The rule was obtained on behalf of John Hopkins Brown, the claimant, on his affidavit that he was a citizen of the United States, and not of Canada, and never was resident therein: that the goods specified in the schedule to the interpleader order were his, and not the property of any other persons: that soon after the seizure of those goods under the writ of attachment in this cause he served notice of his claim to them on the sheriff of Brant, who then had them in his possession, and made an affidavit of his ownership: that after doing this he advised with his counsel, Mr. G. M. Wilson, expressing his wish to abandon proceedings in this cause, and rely upon such remedy as he might have against the plaintiffs above-named under the laws of the State of New York, and was advised that he might abandon the prosecution of his claim to the said goods, and that no order, judgment, or decree would be made in this cause, if he did so, which would bar or in any way interfere with his right to prosecute the said plaintiffs for the seizure and detention of his goods, either in Canada or the United States: that immediately thereupon he directed Mr. Wilson to discontinue the prosecution of his claim, and supposed no action was further had upon the same; and that he then brought a suit against the above plaintiffs in the superior court at Buffalo to recover damages for the wrongful seizure of the goods.

The affidavit proceeded to set forth various matters as to the progress of that suit not material to this rule, and then stated that the trial was fixed to take place in Buffalo in January, 1863, when the counsel retained by him first called his attention to a copy of the interpleader order in this cause, which was the first knowledge he had of its existence: that the cause was called on for trial on the 27th of January, 1863, and the same was put off on the application of the plaintiffs' (the defendants in Buffalo)

counsel, who then also obtained leave to plead the judgment and order of interpleader in bar: that the deponent had no knowledge or belief of the existence of any interlocutory order that could in any way operate to bar his right of action until informed of it by his counsel on the 26th of January, 1863.

There was also an affidavit of Hemmingway, the defendant, stating that he was a son-in-law of Brown: that Brown had lent the goods to his daughter, Hemmingway's wife, and that he (Hemmingway) had no claim to them.

The interpleader summons was issued on the 17th of December, 1861, and the claimant's affidavit was sworn at Brantford on the 21st of September, 1861. The interpleader order was made on the 27th of December, 1861. On the 29th of January, 1862, on the application and affidavit of Mr. Wilson, the claimant's attorney, (which affidavit stated that great loss would ensue and injury be done to the claimant if the time for giving security for costs mentioned in the interpleader order, and for giving security for the appraised value of the goods claimed, was not extended,) a summons was granted to enlarge the time for giving security for twenty days, and to allow the claimant to deposit with the Deputy Clerk of the Crown money, instead of giving other security for costs, and on the return of the summons an order was made pursuant to the terms thereof. On the 26th of March, 1862, the interpleader order and the proceedings thereon were enrolled, a final order barring the claimant having been made on or about the 4th of March, 1862.

The claimant made a further affidavit on the 10th of July, 1863, in support of this application, and his daughter, Mrs. Hemmingway, also made an affidavit for the same purpose. Both affidavits related principally to the right of property of the claimant in the goods seized, contradicting some statements contained in the affidavits on the other side, as to the length of Hemmingway's residence in Goderich, and as to a fictitious address being put on the goods to conceal them from being known to be Hemmingway's goods.

The rule was enlarged in Trinity Term, when *R. A. Harrison* shewed cause, citing Consol. Stats. U. C., ch. 30, secs. 8, 14; *West v. Cooke*, 1 C. B. 313; *Williams v. Crosling*, 3 C. B. 957; *Tinkler v. Hilder*, 4 Ex. 187; *Jessop v. Crawley*, 15 Q. B. 212; *Mercer v. Stanbury*, 2 H. & N. 155, note; *Carpenter v. Pearce*, 27 L. J. Ex. 143; *Meredith v. Gittens*, 21 L. J. Q. B. 273; 21 L. J. Ex. 79, note; *Collins v. Johnson*, 16 C. B. 588, 612, 613.

*Burns*, contra, cited *Roblin v. Moodie*, 2. P. R. 216.

DRAPER, C. J., delivered the judgment of the court.

There have been several objections taken to this rule.

1. It has been argued that the interpleader order of the 27th of December, 1861, was clearly within the power and authority of a judge under the Interpleader Act.

2. That the interpleader order has been enrolled, and is now part of a judgment, which, and not the order, should have been moved against.

3. That the enrolment was made pursuant to an order of the same judge who granted the interpleader order, in March, 1862, by which order the claimant is barred.

4. That this application, if sustainable against these objections, comes too late, the rule *nisi* having only been moved for in Hilary Term last, (February, 1863.)

The first of these appears to us to be fully sustained by the case of *Carpenter v. Pearce*, (27 L. J. Ex. 143.) The court held in that case that a judge has authority by an interpleader order to restrain an action as well against the execution creditor as against the sheriff. We do not find any other report of this case except in the Law Journal; but it is referred to in the later editions of the books of practice, and the reasons for the decision, though briefly given, appear satisfactory.

We pass over the second and third objections, because the opinion we have formed on the first and fourth makes it unnecessary to discuss them.

The cases of *Orchard v. Moxsy*, (2 E. & B. 206,) and *Collins v. Johnson*, (16 C. B. 588,) are conclusive against this rule being made absolute. The latter case would apply

even if we were of opinion with the applicant on the first point, instead of being against him. The Chief Justice of the Common Pleas in giving his opinion says he cannot assent to the doctrine propounded by one of the counsel in argument, that the rule as to lapse of time applies only to those cases where the judge at Chambers makes an order in the proper exercise of his authority, and not to a case where he had no power or discretion to make an order at all; and his lordship expresses his approval of the case of *Meredith v. Gittens*, (21 L. J. Q. B. 273,) where Lord *Campbell* says, "It is a very wholesome rule that all applications to review the decision of a judge at Chambers should be made in the ensuing term," Mr. Justice *Erle* adding that it was the "*established* rule."

The interpleader order, against a part of which this rule is moved, was made on the 27th of December, 1861. The rule was moved in February, 1863, after an interval of four full terms. We have not failed to notice that part of the applicant's affidavit in which he asserts that the first knowledge he had of this interpleader order was in January, 1863. We cannot give implicit credit to this assertion, because we find from the papers before the court that Mr. Wilson, the applicant's counsel and attorney, who was consulted and employed by the applicant to put in the claim for the goods when they were seized, makes a statement on oath which it is extremely difficult to reconcile with the applicant's alleged ignorance of the interpleader order. Mr. Wilson, in order to obtain further time for the applicant to comply with the conditions of the interpleader order as to giving security, makes an affidavit that security for costs was not given within the time limited in consequence of the severe illness of the applicant, as he (Wilson) had been informed by telegram, which he believed to be true. It is not easy to suppose such a telegram to have been despatched for such a purpose without the applicant's knowledge. Again, Mr. Wood in his affidavit of the 28th of May, 1863, states, in addition to the foregoing statement respecting Mr. Wilson, that the applicant had notice of the order of March, 1862, by which the applicant was finally

barred, for the applicant's attorney wrote to him respecting it, and shewed Mr. Wood the applicant's reply, in which he stated in substance that he did not care about the said order, as he intended to proceed in the state of New York against the plaintiffs in this cause as carriers. In his affidavit of the 10th of July, 1863, which is apparently intended as an answer on some points to Mr. Wood's affidavit, the applicant takes no notice of either of these two statements.

The well-established doctrine, that a party whose goods have been placed by himself or with his consent within the jurisdiction of a foreign court is personally liable to the jurisdiction of that court, as far as any question or proceeding affecting such goods is concerned, would alone be sufficient to give this court jurisdiction to bind the applicant's rights in this case, to the same extent that it could bind those of a resident within the jurisdiction. We acted upon that doctrine the other day in giving effect to the adjudication of a local court in the state of Ohio as to goods belonging to a British subject resident in Canada, which were found within that jurisdiction, who had never been in Ohio, and was in fact no party to the proceedings. (*a*). Here the case is stronger, for the applicant employed an attorney and made an affidavit to support his claim to the goods seized by the sheriff in this cause.

We are therefore of opinion this rule must be discharged.

Rule discharged.

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(*a*) Burn v. Bletcher, decided in this term, not yet reported.

## JAMES GRAY v. McCARTY, KEYS, AND WHELAN.

*Division Courts Act, secs. 199, 200—Warrant issued by J.P. without affidavit—Action for seizure under—Secs. 196-198, construction of—Time of seizure—Second seizure—Liability of magistrate.*

Defendant M., a magistrate, gave a warrant to defendant K., a constable, on the 23rd of September, under sec. 200 of the Division Courts Act, to attach the goods of G. in the possession of the plaintiff and others, who were about to abscond. Under this certain goods were seized; and to an action brought against the constable, the magistrate, and the creditor, the constable, K., pleaded not guilty, by secs. 196, 197, and 198 of the act. *Held*, that these sections had clearly no application, for K. was not shewn to be a bailiff of any division court, and had no warrant from the clerk. The magistrate having issued such warrant without the affidavit required, *Held*, that he had no jurisdiction whatever, and was therefore a trespasser. The first seizure took place on the 23rd of September, but the goods were then left with the plaintiff, on his giving a receipt, and on the 25th they were taken away by defendants K. and the creditor. The notice of action was for the seizure on the 25th. It was left to the jury to say when the actual seizure took place, and they found that it was on the 25th. *Held*, that this was a new trespass, for which the magistrate was liable, and a verdict against him was upheld.

TRESPASS *de bonis asportatis*. *Pleas* by defendant McCarty, 1. Not guilty, by Consol. Stats. U. C., ch. 126, secs. 9, 10, 11. *Pleas* by defendant Whelan, 1. Not guilty. 2. Goods not the plaintiff's. 3. Leave and license. *Pleas* by defendant Keys, 1. Not guilty, by Consol. Stats. U. C., ch. 19, secs. 196-198.

The case was tried at Woodstock, in October last, before *Richards, J.*

A notice of action was served on the defendant McCarty on the 22nd of February, 1862, and on the defendant James Keys on the 25th of February, 1862, notifying them that the plaintiff would sue out a writ from this court against them and one Lawrence Whelan, for that they, on the 25th of September, 1861, wrongfully seized and took away two horses. The plaintiff gave secondary evidence of a warrant, (having proved the loss of the original,) dated the 23rd of September, 1861. It was under the hand and seal of defendant McCarty, a justice of the peace, addressed to defendant Keys, a constable, commanding him to attach, seize, and safely keep all the personal estate and effects of Alexander Gray, sen., which were in the possession of one James Gray and others, who were about to abscond, and were then removing the said property, of what nature or

kind soever liable to seizure under execution for debt within the county of Oxford, or a sufficient portion thereof to secure to Lawrence Whelan the sum of \$100, together with the costs thereon, and to return this warrant, together with what he should have taken thereupon, to the clerk of the third division court of the county of Oxford forthwith. An inventory or receipt was in like manner proved, bearing date the 23rd of September, 1861, mentioning, among other things, "one span of horses, waggon and harness, in full," which Edward Dundas and the plaintiff, James Gray, agreed to deliver up to defendant Keys, on and by the 25th of September, 1861, at noon, being seized in suit of Whelan v. Gray.

The plaintiff gave strong evidence of his ownership of these horses. Alexander Gray, sen., it was proved, died on the 19th of December, 1860. It was said, but not proved, that he left a will. A witness swore that he saw Keys and Whelan both present when the horses were taken. Plaintiff was going down to the village with them. This witness thought it was about the 25th of September, 1861. He thought they went to the provincial fair next day. The plaintiff never got the horses back. They were in his possession at the time of the seizure, and were the only team he had.

The clerk of the division court of the division within which the plaintiff resided swore that there were no proceedings in that court in any suit of Whelan v. Gray. The defendant McCarty was called by the plaintiff, and stated that he issued this warrant without any affidavit having been made, and that he heard the other two defendants say they had seized upon this warrant a pair of horses, and, as he understood, the horses were taken away to one Huston's. Whelan came to the witness with the warrant prepared and wished him to sign it. They (*i.e.*, Keys and Whelan) were very urgent, and McCarty did sign it. Whelan was to have made out the form and taken the affidavit, but it was put off from time to time, until Whelan said they had settled it, and then it was not necessary to make the affidavit.

The writ in this cause was issued on the 24th of March, 1863.

The only point doubtful on the evidence was whether the action was begun within six months after the wrongful act committed. According to the inventory and receipt, the seizure was made on the 23rd of September, 1862, but then the property was not taken away. The receipt was for the delivery of the property on the 25th of September, and the evidence of one witness went to shew that upon that day the defendants Keys and Whelan took away the horses from the plaintiff. It was proved that the defendant Keys was subpoenaed and paid for his attendance, but he was not examined at the trial, not appearing when called.

The learned judge left it to the jury to say on what day the seizure was made, and to determine the value of the horses, and they found that the actual seizure was on the 25th of September, and gave the plaintiff a verdict for £53, 5s., against all the defendants.

In Michaelmas Term, *Anderson* obtained a rule *nisi* for a new trial on the law and evidence, objecting that the suit was not brought against the magistrate and constable, two of the defendants, within six months after the alleged cause of action arose; and that the verdict as to the date of the seizure was against law and evidence. And for misdirection, in this, that the question submitted to the jury as to the date of seizure was improperly submitted, the evidence clearly proving the date of seizure to have been more than six months prior to the commencement of the suit, and that the question whether the seizure was on the day contended for by the plaintiff or at an earlier day was a question of law, and not one of fact.

In Trinity Term, *Freeman*, Q. C., shewed cause, producing a copy of the rule *nisi*, with an affidavit of the service thereof on the agents of the plaintiff's attorney. No one appeared to support the rule, and it did not even appear that it was not lapsed. With some little doubt, *Freeman* was heard, on the ground that it appeared the rule had been served on the plaintiff, and that by his counsel appearing to answer it, it was admitted to be a rule still pending.

DRAPER, C. J., delivered the judgment of the court.

The only doubt that can arise is whether the magistrate is liable. As to the defendant Keys, his plea of not guilty is stated to be founded on the Division Courts Act, secs. 196, 197, and 198. These sections, however, are limited to the protection of the *bailiffs* of the division courts, and of persons acting by the order and in aid of the bailiff, "*for anything done in obedience to any warrant under the hand of the clerk and seal of the court.*" No such warrant appears to have been issued here, and the warrant of which evidence was given was directed to the defendant Keys, a constable, and there was not any proof offered that he was a bailiff of any division court. He does not therefore bring himself within the protection of the sections referred to by his plea of not guilty. He does not invoke the protection of the 193rd and 194th sections of the Division Courts Act, to which, if to anything in that statute, he might have appealed, nor has he relied on the act to protect justices of the peace and other officers from vexatious actions, Consol. Stats. U. C., ch. 126, secs. 9, 10, 11, 20. His case, therefore, rests simply on not guilty, and the evidence, which is conclusive against Whelan, is equally so against him.

The justice of the peace, however, McCarty, pleads not guilty by the statute just referred to, ch. 126, secs. 9, 10, 11. The authority of this defendant is not derived from the general authority vested in him as being in the commission of the peace, nor from any special authority conferred on justices of the peace by statute in any criminal or *quasi*-criminal matter. His power to issue a warrant of attachment to seize the personal estate and effects of an absconding, concealed, or removing debtor, is conferred exclusively by the 199th and 200th sections of the Division Courts Act. The former of these sections enacts that in case a creditor of such debtor makes and produces an affidavit or affirmation of a specified purport, and such affidavit or affirmation is filed with the clerk of the division court, then the clerk, on the application of the creditor, may issue a warrant to the bailiff of the division court, or any constable of the county, commanding him to attach, &c. And by the latter section,

"The judge or a justice of the peace for the county may take" (meaning, *administer*) "the affidavit in the last preceding section mentioned, *and upon the same being filed with such judge or justice*, the judge or justice may issue a warrant," &c., "and such judge or justice shall forthwith transmit the affidavit to the clerk of the division court within whose division the same was made," &c.

Until such affidavit is filed with the justice he has no jurisdiction whatever. We take the principle to be as enunciated in *Caudle v. Seymour*, (1 Q. B. 889,) though there the magistrate professed to act in a criminal matter. The court held that to give the magistrate jurisdiction there should have been an information properly laid. Then, without any such information, if he issues a warrant to attach goods, under which the plaintiff's goods are attached, he is a trespasser. The first seizure of the goods was no doubt on the 23rd of September, 1862, and was illegal, but they were left in the plaintiff's possession. On the 25th of September it appears that the other two defendants, still acting under this warrant, took away the goods out of the plaintiff's possession and carried them away, and converted them, the plaintiff never having got them back. The trespass on the 25th is the one for which the notice of action was given. Probably but for this act no action would have been brought, as until then the plaintiff had not sustained any substantial damages. This was a new trespass, for which the magistrate was liable. The question was left to the jury as to the time when this latter trespass was committed, and they found it to be within six months from the day on which this action was commenced. Under these circumstances, we think the rule ought to be discharged.

Rule discharged.

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## CRABTREE V. GRIFFITH.

*Innkeeper—Lien on horses for keep—Special agreement.*

One W. left his horses at the plaintiff's inn, agreeing that he should retain them as security for their keep. He was a teamster, not living at the plaintiff's; and it appeared that he used the horses as he wished, sometimes keeping them away for several days, and that the plaintiff also used them when he chose, for which W. said he supposed the plaintiff would allow him against their keep. W. had had them away for three days, and had brought them back into the plaintiff's yard, when they were seized under a division court execution against W.

In an action brought by the plaintiff for this seizure, the jury having found for the plaintiff, and the question whether the goods had before the seizure been actually returned into the plaintiff's possession not having been submitted to them,

*Held*, that it could not be assumed that they had found this not to have been the case, and a new trial was granted without costs.

ACTION for breaking and entering a yard of the plaintiff attached to the inn of the plaintiff in Verulam, breaking gates, locks, &c.

*Second count*, for breaking and entering a stable of the plaintiff.

*Third count*, for seizing and taking a span of horses, waggon and harness, of the plaintiff.

*Fourth count*, for falsely and maliciously, and without reasonable or probable cause, charging the plaintiff before a justice of the peace with having forcibly rescued two mares, harness and waggon, that defendant had seized in his yard under an execution, and that defendant had reasonable cause to suspect, and did suspect, these chattels were concealed in the stables or outhouses of the plaintiff: that defendant thereupon obtained a search warrant, and under the same caused the plaintiff's stable to be broken open, and the plaintiff's horses, harness and waggon, to be taken from the plaintiff's stable and premises.

*Fifth count*, in trover.

*Pleas*, 1. Not guilty. 2. To so much of the first count as charges trespass to the realty, that before, &c., one J. P. Rowers sued out a division court warrant of execution, directed to defendant, being a bailiff of the court, commanding him to levy of the goods of Henry Wolfram £25, which warrant duly indorsed was delivered to defendant, being

such bailiff: that defendant under that warrant peaceably broke and entered the plaintiff's yard, the gate being open, and the yard being within the limits of the division court, and seized the goods of Wolfram then in the yard.

3. To the third, fourth, and fifth counts, that the goods therein mentioned were not the plaintiff's.

The plaintiff joined issue on the first and third pleas, and replied to the second, admitting the warrant, *de injuriâ*.

The case was tried at Lindsay, in April, 1863, before *Hagarty, J.*

Notice of action was served on the 17th of January, 1863, and a second notice served on the 24th of January, 1863. Wolfram, against whose goods the execution from the division court issued, swore that he gave his horses to the plaintiff last winter in security for their keep, that if the plaintiff would feed the horses he should have them in security. The plaintiff kept an inn. Wolfram said he kept his horses there always, from about the 1st of October, 1862, except when he was using them, and paid the plaintiff something: that a little over \$22 was finally due to the plaintiff for their keep. The defendant came one day about noon, broke the stable door open, and took the horses away. The day before this defendant came into the plaintiff's yard, and the plaintiff asked him to pay him his bill before the horses were taken, and wanted to put the horses into the stable and feed them, but defendant refused to let them. One Burns first seized the team in the plaintiff's yard, and the plaintiff came and told him he had a claim, and would not let them go without his pay, and then defendant came and levied on them, and wanted to take them away. The plaintiff got the horses into the stable and made his boy lock the stable door. Wolfram did not live at the plaintiff's. He used the horses after this arrangement. He was a teamster, and had the horses away for three and a half days before the seizure, teaming on his own account. The plaintiff used them when he wanted, and Wolfram said he supposed the plaintiff would allow him for using them against their keep.

Burns said he was acting as deputy to defendant when defendant seized the horses, after dark on the 8th of January,

1863. The plaintiff said he would not let them go till his claim was paid. The gate of the yard was locked after this, as defendant was trying to get them out. Burns left the place, but returned the same evening, and found plaintiff and defendant disputing about the horses, and left them so. The next day Burns received a warrant (produced) from a justice of the peace to search for the horses, harness and waggon, in the stable and outhouses of the plaintiff, and if found, &c. Burns went with this warrant with defendant, and they forced open the stable door. Burns broke the lock, defendant assisting him. Burns was a constable, and the warrant was addressed to all or any of the constables in the county. The defendant went with Burns to point out the property.

The information lodged by defendant was put in, sworn before a justice of the peace, on the 10th of January, 1863, charging that on the 9th of January the plaintiff seized and rescued from him the chattels in question, taken by him (defendant) on an execution on the said 9th of January, in the public yard at the plaintiff's hotel.

For the defence it was objected that there was no evidence of breaking the gates charged in the first count; and on the third count no evidence of lien, for Wolfram was not a guest at the inn: that there was no common law lien, and if there was a lien by agreement there was no continuing possession to affect third parties, and the horses were seized out of Wolfram's possession. Leave was reserved on this to move for a nonsuit.

It was further urged that on the fourth count the jury should be directed there was reasonable and probable cause, and therefore to find for defendant.

The learned judge, subject to the leave reserved, asked the jury to separate the damages, and to find whether there was by agreement such a lien as was set up by the plaintiff, and the amount to which the plaintiff was entitled under it; also to find damages for defendant's conduct in laying the information on oath and obtaining the issuing of a warrant thereon, if the jury found that his conduct was *malá fide*, and his statements knowingly untrue; also, whether there was a

lien or not, to fix the damages for breaking open the stable door.

The jury found for the plaintiff, giving \$32.50 damages on the claim of lien, and \$10 for the breaking, and \$10 on the fourth count.

In Easter Term *Eccles*, Q. C., obtained a rule *nisi* for a nonsuit on the leave reserved, on the ground that the pretended lien of the plaintiff was void in law as against creditors, and therefore defendant's acts were justifiable; or for a new trial, the verdict being contrary to law and evidence, the defendant's acts being fully justified at the trial. Or to arrest the judgment on the fourth count, or to award a repleader or *stet processus*, on the ground that this count disclosed no good cause of action, and did not negative the foundation of the acts therein charged against defendant, or shew that the subject-matter of such charge was untrue or unfounded, or if untrue or unfounded, that a cause of action consequently followed.

*Nanton* shewed cause. He referred to *Legg v. Evans*, 4 Jur. 197, as to the lien, in which the court held that property held by way of lien cannot be taken in execution on a *fi. fa.* against the party who has the lien. As to the other cause of action, he cited *Hensworth v. Fowkes*, 4 B. & Ad. 449.

DRAPER, C. J., delivered the judgment of the court.

The plaintiff clearly had no lien upon these horses, &c., as an innkeeper, because Wolfram, the owner of them, was not a guest at the inn. Neither has the plaintiff a lien at common law on these horses merely because the owner delivered them to him to stable, feed, and take care of them, (*Judson v. Etheridge*, 1 Cr. & M. 743.) The plaintiff's right to a lien over these horses, harness, and waggon must depend upon his special agreement with Wolfram. The evidence of Wolfram, however, who alone proves the contract, places the plaintiff very much in the position of a livery-stable keeper, who at common law has no lien, (*Orchard v. Rackstraw*, 9 C. B. 698), since Wolfram retained the right to use and work the horses, &c., and might for that purpose take them away,

making it therefore part of the contract that the plaintiff should redeliver, or at least permit Wolfram to take, the horses, &c., from time to time to use in his business as a teamster. And there was this further peculiarity in the transaction, that the plaintiff himself might use the horses, harness, and waggon, Wolfram supposing, as he stated, that the plaintiff would allow for using them against the keep of the horses. We do not doubt but that the plaintiff might by express contract reserve a right to take and hold this property as a security for the payment of an existing debt, so that he might after parting with them resume possession, and so re-establish the lien. Here, however, there was no existing debt at the first delivery, and if there had been, the right to resume possession must be subject to the condition that no rights of a third party have attached on the goods while out of the plaintiff's possession.

The general rule is that there can be no lien upon any property unless it is in the possession of the party who claims the lien, and unless by express contract this rule applies where the possession has been parted with, and has afterwards been recovered, (*Sweet v. Pym*, 1 East, 4,) unless indeed the property has been taken away by a trespasser or by fraud, (*Wallace v. Woodgate*, R. & M. 193.) If therefore while the plaintiff had possession he had also a lien by virtue of the special agreement, and might from time to time reassert the lien, whenever Wolfram having taken away the horses had brought them back and redelivered them, the lien could not continue while Wolfram was in the actual possession. But the evidence appears to us to establish that the defendant seized the property on the execution against Wolfram while it was in Wolfram's possession, and had been for three days. He brought these horses to the plaintiff's premises, and no doubt intended to return them into the plaintiff's possession, but whether he had done so does not appear to us to have been made a question for the jury, and so far as we can judge the weight of evidence is against that conclusion. As it is, we cannot assume that it has been found that the rights of Wolfram's creditor on the execution had not attached upon the property before it got back into

the actual possession of the plaintiff, and while Wolfram had it in use for his own benefit. We are of opinion, therefore, that there must be a new trial without costs.

As to the fourth count, it is to be observed that the information laid by the defendant was that the plaintiff had forcibly rescued the goods from the hands of the defendant, who had taken them in execution. If, in fact, the bailiff had lawfully seized them when the plaintiff had lost the lien upon them, it would materially affect the question of reasonable and probable cause.

Rule absolute for new trial.

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#### HALL V. HILL.

*Sale for taxes—Ejectment—Proof of taxes in arrear—Form of warrant—Advertisement.*

In ejectment upon a sale for taxes, made under 16 Vict., ch. 182, *Held*, 1. That the evidence of the treasurer, producing his official books and shewing that the lands were charged with the taxes when the warrant issued, was sufficient proof of their being in arrear. *Quere*, whether the warrant alone would not suffice.

2. That the omission to distinguish in the warrant, as directed by the 56th section of the act, between lands patented and those under lease or license of occupation, was fatal.

*Semble*, that it is sufficient to state the lands to be sold in a schedule annexed to the warrant, if such schedule is expressly incorporated with it; but if the warrant mention no lands and the schedule is not so incorporated, *quere*.

*Semble*, also, that the omission to advertise in a local paper as well as in the *Gazette* would avoid the sale. *Jarvis v. Brooke*, 11 U. C. R. 229, commented upon.

EJECTMENT for the west half of lot No. 10, in the thirteenth concession of Emily. Appearance for the whole. Writ issued 10th of October, 1862.

The plaintiff claimed under a sheriff's deed for taxes, dated the 19th of December, 1855, made by Wilson S. Conger, then sheriff, to the plaintiff.

The defendant gave notice that, besides denying the title of the plaintiff, he claimed title as tenant to Robert Follis, from whom he leased the same.

The trial took place at Peterborough, in April, 1863, before *Hagarty*, J.

It was proved that by the entries in the treasurer's books kept in the treasurer's office, and which were brought into court and proved by the treasurer, this lot appeared to be and was entered as in arrear for taxes for six years, before the issue of the warrant to sell, which was produced, and bore date the 7th of August, 1854. Letters patent were put in, dated the 8th of February, 1838, granting this lot to one James Fenton in fee. A schedule of lots to be sold for taxes was produced, including this lot, which the treasurer swore he presumed was attached to his warrant to the sheriff to sell. Mr. Conger, the sheriff at that time, proved that he received the warrant, but he could not speak positively whether the schedule was attached to it or not when he received it; in one or two cases the warrant came to his hands first and the schedule after. He thought that the advertisements were correctly given. The notice was dated on the 9th of August, 1854, and first appeared in the *Gazette* on the 19th of August. It was also in the *Gazette* of the 11th of November, 1854, which was apparently the last advertisement. This advertisement was not inserted in the local paper. The sale was advertised for the 21st of November, 1854, but this lot was sold at an adjourned sale on the 4th of December, 1854. This adjournment was advertised in a local paper, not in the *Gazette*. On the 4th of December, 1854, the sheriff signed a certificate of the sale to the plaintiff, and on the 17th of December, 1855, executed a conveyance of the lot to the plaintiff. The treasurer proved that the redemption money had not been paid.

For the defence it was objected that there was no evidence the taxes were in arrear, and that the warrant did not distinguish between lands patented in fee, or under lease, or under license of occupation, nor did the advertisement. The objections were overruled, but leave was reserved to move on the first point.

A witness was then called, who stated that he thought, but was not sure, he had bought this lot before the sale to the plaintiff: he executed a quitclaim deed of it, dated the 5th of December, 1854, to Mr. J. H. Cameron: he did not think that he had any interest in the land when it was sold for

taxes: he received no consideration for executing the quit-claim: he was at the tax sale, but did not then speak to the plaintiff. Mr. Conger stated that the lot was sold on the 21st of November, 1854, and the name of the last witness was pencilled in the book as purchaser. The sheriff could not say why he abandoned this purchase.

On this evidence the plaintiff had a verdict.

In Easter Term, *Eccles*, Q. C., obtained a rule *nisi* to enter a nonsuit on the leave reserved, renewing all the objections taken at *nisi prius*; or for a new trial on the law and evidence, and for misdirection in regard to the sufficiency of the advertisement of sale in the official gazette.

*D. B. Read*, Q. C., shewed cause. He cited *Jarvis v. Cayley*, 11 U. C. R. 282; *Jarvis v. Brooke*, 11 U. C. R. 299; *Williams v. Taylor*, 13 C. P. 219; *Doe v. Reaumore*, 3 O. S. 243; *Doe dem. Bell v. Orr*, 5 O. S. 433; *Allan v. Fisher*, 13 C. P. 63.

*Eccles*, Q. C., and *Gwynne*, Q. C., supported the rule, and cited *Munro v. Grey*, 12 U. C. R. 647; *Errington v. Dumble*, 8 C. P. 65.

DRAPER, C. J., delivered the judgment of the court.

In *Doe v. Reaumore*, the rule was laid down that the writs to sell lands for taxes must be grounded on the treasurer's return to the Court of Quarter Sessions declaring the assessments on the lands therein mentioned to be in arrear for eight years. This decision was under the statute of Upper Canada, 6 Geo. IV., and has always been acted upon in construing that act. Upon this return, or, as the statute termed it, account of all the lots in arrear for taxes, it was the duty of the clerk of the peace to make out a writ, directing the sheriff to levy the respective amounts by sale of such portion of the lands respectively charged as was necessary. In 1850 this act was repealed by 13 & 14 Vict., ch. 66. The case of *Munro v. Grey* (12 U. C. R. 647) was founded on the same statute, for the tax sale relied upon by the defendant took place before 1839, and it was not proved that the treasurer had made any return to the

Court of Quarter Sessions. *Errington v. Dumble* (8 C. P. 65) was decided upon the same ground.

The 16 Vict., ch. 182, which repealed all then existing acts on this subject, made different provisions. It enacted (sec. 55) that whenever a portion of the tax upon any land has been due for five years, the treasurer shall issue a warrant under his hand and seal to the sheriff of his county, to levy such arrears; and (sec. 56) he was to distinguish in this warrant lands patented from those under a lease or license of occupation, the fee of which remained in the Crown. The proof to be given that taxes were in arrear must therefore be different from that made necessary by the case of *Doe v. Reaumore*, for the treasurer is no longer required to make a return. His warrant combines the return required by the statute, 6 Geo. IV., and the writ to be issued thereupon by the clerk of the peace, and it may be open to argument whether his warrant alone is not *prima facie* evidence that the taxes therein mentioned are in arrear. But, however this may be, we see no reason to doubt that the evidence of the treasurer himself, producing his official books, and shewing therefrom that the lands in question were charged with taxes which were unpaid when the warrant issued, is as good proof as the treasurer's return was under the old act. The 51st, 52nd, and 53rd sections of the 16 Vict. go far to shew that the entries made in the treasurer's books under these sections are sufficient to establish, at least till contradicted, that the taxes were in arrear.

We are therefore of opinion that sufficient evidence was given on this point, and that so much of this rule as relates to entering a nonsuit must be discharged, as the leave to move was reserved only upon this objection.

On the motion for new trial the defendant's counsel have raised two points. 1st. That neither the warrant nor the advertisement of the sale distinguish between lands patented, and those under lease or license of occupation, which the 56th section of 16 Vict. expressly requires. 2ndly. That the sheriff has disregarded the 57th section in these respects, that he caused no advertisement of the sale to be published in a local newspaper, and that the day fixed for the sale was

less than three calendar months from the first publication of the advertisement in the *Gazette*.

In our opinion the directions of the statute as to what the treasurer's warrant shall contain are mandatory and imperative. The matter to be set forth under the 56th section will give information without which the sheriff cannot discharge the duty imposed upon him by the same section, and without which no intending purchaser can at the sale ascertain whether a title in fee-simple, or only the interest of a lessee or licensee of the Crown is offered by the sheriff for sale. The words of the 56th section, that the treasurer, in his warrant, "*shall* distinguish," are as imperative in form as those of the preceding section, that the treasurer "*shall* issue" a warrant; and we do not think that because these directions are contained in two separate sections we can construe them differently than we should feel bound to do if all that the treasurer is required to do by the latter were incorporated in and formed part of the former. We do not see, if it were so, that we could hold that he was bound to issue his warrant, and yet not bound to state in it what the Legislature unequivocally required. Unless the warrant to the sheriff contains all that the statute directs, we do not perceive that it gives the authority necessary to sell, and the sheriff could not fail to discover the omission the moment he prepared or endeavoured to prepare such an advertisement as the 56th section directs.

We think this objection fatal to the plaintiff's recovery.

We observe also that it is stated in the evidence that the warrant was accompanied by a schedule. We have not found anything in the statute about a schedule being authorised or required; but as no form of warrant is given, it may be that a schedule of the lands to be sold and of the arrears due thereon being expressly incorporated with the warrant may be properly deemed part of it, and so amount to a compliance with the 55th section, which says the treasurer shall issue a warrant commanding the sheriff to levy upon "the said lands" for the amount of the arrears due thereon, and his costs. By the words "said lands" we understand lands charged in the treasurer's books with taxes

under the 51st, 52nd, and 53rd sections of the act. If the warrant itself mentioned no particular lands, and no schedule was expressly incorporated with it, we are not prepared at present to say that it would be sufficient. No objection, however, has been raised on this ground, and we will only observe that much difficulty and litigation would be prevented if the different officers would as closely as possible follow the directions of the act, instead of substituting something which they may deem to be equivalent, and which they find more convenient to themselves. The Legislature have been more than once called upon to remedy defects or injustice arising from errors or omissions of this character, and we are afraid that the present may turn out to be one of the cases requiring such aid.

As to the other objections, the statute 16 Vict. requires an advertisement in a local newspaper as well as in the *Gazette*. So did the statute 6 Geo. IV.; but that act contained a clause enacting that no omission of any direction therein contained relating to notices or forms of proceeding previous to any sale should render such sale invalid.

None of the statutes passed since that act was repealed contain a similar provision. We must, we think, hold the omission was intentional: and not the less so, that by section 58 of 16 Vict. no sale of lands for taxes was to be void by reason of there having been goods and chattels thereon, and of the sheriff's neglect to levy the tax by distress and sale thereof. The courts had held that under the 6 Geo. IV. the law was otherwise. But for that provision, we should have thought a construction of the act holding compliance necessary with the different directions thereof would have prevailed.

We have not overlooked the language used in giving judgment in the case of *Jarvis v. Brooke*, (11 U. C. R. 299.) But, strictly speaking, the case, as submitted to the court, did not involve the question, for it did not form part of it that with respect to the lands not in the county of York, but in some other county, there was not an advertisement in a local newspaper of that other county. The fact was assumed, as "it seemed to be admitted on the argument," and

therefore the point was not in judgment. We must confess that we more readily concur with what is said in *Doe v. Reaume*, (3 O. S. 247 :) "The operation of this statute is to work a forfeiture; an accumulated penalty is imposed for an alleged default, and to satisfy the assessments charged, together with this penalty, the land of a proprietor may be sold, though he may be in a distant part of the world, and unconscious of the proceeding. To support a sale made under such circumstances, it must, in my opinion, be shewn that those facts existed which are alleged to have created the forfeiture, and which are necessary to warrant the sale; for a clerical error or the wilful or negligent omission of a ministerial officer shall not deprive a man of his estate."

In *Williams v. Taylor*, (13 C. P. 219,) it was held that under the statute 16 Vict., ch. 183, the advertisement in the local paper was equally necessary with an advertisement in the government *Gazette*; and for want of the former advertisement the defendant, the purchaser at the sheriff's sale, who resisted the right of the original owner, must fail, and such advertisement was one of the conditions upon which the sale for taxes otherwise void was confirmed. That decision, though under a different statute, was upon a case very analogous in principle; and if it were necessary for the decision of this case, we should, as at present advised, arrive at the same conclusion. But upon the objection to the treasurer's warrant we think the rule for a new trial should be made absolute, with costs to abide the event.

Rule absolute.

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## MARSDEN V. HENDERSON.

*Libel—Variance—Reference to a class—Proof that the plaintiff was intended  
—Slander of plaintiff in his business.*

A declaration for libel set out the following words: "The farmers, as a class of producers, are the only ones that I am aware of who allow another class, the purchasers of their produce, the sole right to weigh their produce, and helplessly submit to their decision.\* This state of things has introduced a class of men somewhat similar to Rob Roy, who call themselves commission merchants and wheat-buyers, and make it their business to levy black-mail upon every man that sells them a load of wheat. This is done by a species of thimble-rigging, performed on the platform scales by which from five to ten bushels are taken from every hundred bushels bought;"—with an innuendo that all this was intended to charge the plaintiff with such practices.

In the libel proved, at the place marked \* this sentence was contained: "This state of helpless dependency has been introduced with the platform scales, which the farmer has not yet learned to use, for when the balance scale was in use either party performed the operation of weighing, and fraud was soon detected."

*Held*, not a substantial variance, for the same imputation appeared upon the writing with or without the part omitted.

*Held*, also, that though a class only was described the plaintiff might be referred to, and that a verdict in his favour was justified by the evidence of witnesses who stated this to be their understanding and belief.

In another count, for slander, the plaintiff alleged that he was a commission merchant buying wheat, and that the defendant spoke of him, in relation to his said trade, "I sold wheat to Mr. Marsden, and he cheated me out of two bushels of wheat, and when I went to try the scales he finger-rigged some screw about the scales, and threw on some weight at the same time, and I will not patronise him any more." *Held*, clearly a slander of the plaintiff in his business.

THE declaration set forth that the plaintiff was a corn merchant, and carried on an extensive business in buying wheat on commission and otherwise; yet defendant spoke and published of the plaintiff, in relation to his said trade, and the carrying on and conducting thereof, the words following: "I sold wheat to Mr. Marsden, and he cheated me out of two bushels of wheat, and when I went to try the scales he finger-rigged some screw about the scales, and threw on some weight at the same time, and I will not patronise him any more"—meaning to convey to the persons in whose presence and hearing the words were spoken that the plaintiff cheated, and was guilty of fraudulent practices in his said business. No special damage was averred.

*Second count.*—A similar inducement, and that the plaintiff in conducting his business used platform scales for weighing wheat purchased by him, and that the plaintiff had, just

before the committing the grievance hereinafter mentioned, in the exercise of his business, purchased from the defendant certain wheat, and paid him therefor, according to the weight as shewn by the platform scales so used by the plaintiff, and that the scales were correct, just, and lawful—yet defendant falsely and maliciously printed and published concerning the plaintiff, in relation to his said business and the said purchase of wheat by him from defendant, in a newspaper called the *Newmarket Era*, the words following: “The farmers, as a class of producers, are the only ones that I am aware of who allow another class, the purchasers of their produce, the sole right to weigh their produce, and helplessly submit to their decision. This state of things has introduced a class of men somewhat similar to Rob Roy, who call themselves commission merchants and wheat-buyers, and make it their business to levy black-mail upon every man that sells them a load of wheat. This is done by a species of thimble-rigging performed on the platform scales, by which from five to ten bushels are taken from every hundred bushels bought,” (innuendo, that all this was intended to charge the plaintiff with such dishonest practices.)

*Pleas*, to the first count, 1st, not guilty.

2nd, that before the speaking, &c., to wit, on, &c., and at divers times theretofore, the plaintiff was guilty of fraudulent practices in his said business by the means in the words in the first count mentioned, in that the plaintiff, among other fraudulent practices in his business, did by fraudulent means and contrivances knowingly cause the said scales to indicate the weight of the defendant's wheat, which was then weighed thereon, and which the plaintiff was then purchasing from defendant, at less than its true weight, as the plaintiff then well knew, and thereby defrauded defendant of a great quantity of wheat, namely, 120 bushels; and also, that the plaintiff was theretofore guilty of other fraudulent practices of the like nature in his business, by the means and in the manner in the said words mentioned, wherefore defendant spoke, &c.

To the second count, 1st, not guilty; and, 2nd, a justification similar to that pleaded to the first count.

The plaintiff took issue on all the pleas.

The case was tried before *Hagarty, J.*, at the spring assizes for York and Peel. The speaking of the words charged in the first count was proved. To prove the second count, the plaintiff put in a newspaper called the *Newmarket Era*, bearing date February 6th, 1863, and called the publisher, who produced the original manuscript of the article complained of in the second count, and stated that the defendant brought it to him, and told the witness of defendant's difficulty with the plaintiff: that he had been down to prove the scale: that the plaintiff threw a weight on the platform, and had to adjust a ball before they would balance. Defendant asked witness would he countenance such thimble-rigging. He had heard defendant say what the other witnesses had sworn about the plaintiff. Defendant said he was convinced that the plaintiff had wronged him out of two bushels of wheat. This witness stated that he added a note to the letter of defendant, which was published in this newspaper, containing as follows: "We have been assured by the author of the above that his remarks are not intended as personal, or to apply strictly to this locality, but to other places as well." The defendant's letter, with this note attached, was published in the whole edition of that number. About 1,000 copies were issued. Evidence was given by some witnesses that they understood this article to refer to the plaintiff.

For defendant, it was objected that there was a variance between the paper put in evidence and the record: that two sentences were put in the declaration as consecutive, leaving out what came between them. In the paper, after the word "decision," there followed: "This state of helpless dependency has been introduced with the platform scales, which the farmer has not yet learned to use, for when the balance scale was in use either party performed the operation of weighing, and fraud was soon detected." Then followed the residue of what was in the declaration. It was also objected that nothing in it applied to the plaintiff directly: that the first count charged an intention to charge the plaintiff with cheating the public and slandering him in his business:

that the words *per se* were not actionable, and it must be proved that they had reference to the plaintiff in his business, and slandered him in his business: that these words did not slander him in his business of a commission merchant.

Leave was reserved to move for a nonsuit on the libel count, on three points:—1st. That there was no proper proof by witnesses as to their understanding of the article pointing at the plaintiff. 2nd. That it was too general, and pointed at no one. 3rd. That it omitted an important sentence affecting the entire sense.

The objections to the second count were overruled. The defendant went into evidence, but it did not at all sustain his justification, and the plaintiff called some witnesses in reply, whose testimony went to shew that the platform scales were just, and that he (the plaintiff) used them both for buying and selling, though a person who used them might cheat by calling out wrong numbers or using false weights.

The jury were asked if the libel pointed with reasonable distinctness to the plaintiff, so that ordinary men might reasonably believe him to be the person indicated, and were told that if so it was libellous against him: that great latitude was justly allowed in such discussions, and that any person had a right to discuss matters of public interest: that the part that would be libellous (if any were) was that about the class of persons levying black-mail, &c., on every man selling them a load of wheat.

The defendant's counsel desired the learned judge to tell the jury that managing scales was not part of the trade of a commission merchant, nor was it his duty to protect persons selling wheat to him.

The jury found for the plaintiff, damages \$12, 50c.

In Easter Term, *McMichael* obtained a rule *nisi* to enter a nonsuit on the leave reserved, on the ground of variance; or for a new trial on the law and evidence, and for misdirection, as there was no libel proved, and no evidence on the second count, and the verdict on both counts could not be sustained: that no slander of the plaintiff in his business of a

commission merchant was proved, and the complaint that defendant was cheated in a single transaction was no slander of his business: that managing scales was no part of the profession of a commission merchant, and that no special damage was shewn;—or in arrest of judgment, because the second count shewed no libel: that statements as to a class were not slanders of an individual, and therefore the paper set out was no slander of an individual.

In Trinity Term, *Robert A. Harrison* shewed cause. He referred to *Tabart v. Tipper*, 1 Camp. 350; *Rutherford v. Evans*, 6 Bing. 451; *Cartwright v. Wright*, 5 B. & Al. 615; *Huckle v. Reynolds*, 7 C. B. N. S. 114; *Smiley v. Macdougall*, 10 U. C. R. 113; *Hamilton v. Burwell*, 2 O. S. 305; *Le Fanu v. Malcolmson*, 1 H. L. Cas. 637; *Solomon v. Lawson*, 8 Q. B. 823; *Bourke v. Warren*, 2 C. & P. 307; *Lumby v. Allday*, 1 Cr. & J. 301; *Doyley v. Roberts*, 3 Bing. N. C. 835; *Southee v. Denny*, 1 Ex. 196; *Griffiths v. Lewis*, 7 Q. B. 61; *Ayre v. Craven*, 2 A. & E. 2.

*M. C. Cameron*, Q. C., in reply, cited *Evans v. Harlow*, 5 Q. B. 624; *Young v. Macrae*, 32 L. J. Q. B. 6, S. C., 11 W. R. 63, 7 L. T. Rep. N. S. 354.

DRAPER, C. J., delivered the judgment of the court.

First, as to the libel. The first sentence set out in the declaration speaks of the farmers as a class submitting to the purchasers of their produce as another class the sole right to weigh their produce, and then follows the second sentence: "This state of things has introduced a class of men," &c. The intervening passage, not in the declaration, states that this helpless state of dependence has been introduced with the platform scales, which the farmer has not yet learned to use, for when the balance scale was in use either party performed the operation of weighing, and fraud was soon detected. This state of things has introduced a class of men, &c., (as in the declaration.) The omitted passage certainly does qualify and alter the meaning of the words, "this state of things," which we have no doubt refer to all that preceded, both that stated in and that omitted from the declaration. But the question remains, as is said in *Ruther-*

ford v. Evans, (6 Bing. 451,) whether any real substantial difference of construction would have arisen upon the whole letter when set out on the record. It appears to us that all the libellous matter is contained in that which follows, where speaking of commission merchants and wheat-buyers, they are said to make it their business to levy black-mail, &c. The omitted part does not, as appears to us, alter the character or effect of this imputation; but, as is also said in Rutherford v. Evans, the very same libel appears from the perusal of the whole as from the part set out. We think, therefore, the objection as to variance fails, which is the only ground mentioned in that part of the rule asking for a nonsuit.

A new trial is asked for as to this count on the law and evidence, and for misdirection, because no libel was proved, and there was no evidence on the second count. But there was direct evidence that the defendant furnished the manuscript, in order to have it published in the newspaper, and that it was published accordingly; and the only remaining question is whether it was sufficiently proved that it related to the plaintiff. The cases of *Le Fanu v. Malcolmson*, cited by Mr. Harrison, and *Turner v. Merryweather*, (19 L. J. C. P. 10, 7 C. B. 251, see also *Wakley v. Healey*, in error, 7 C. B. 591,) satisfy us on this point. In the former case the declaration, which recited that the plaintiff was owner of a factory in Ireland, and charged that the defendant published of him and of the said factory a libel imputing "in some of the Irish factories (meaning the plaintiff's factory) cruelties were practised," though there was no allegation otherwise connecting the libel with the plaintiff, was held good after verdict; and it was held that where a class is described it may very well be that the slander refers to an individual. Whether it does refer to the plaintiff is a question for the jury. Witnesses were called, who stated their belief and understanding that the present plaintiff was referred to in the libel set out and proved, and the jury have adopted the same conclusion.

The question is then reduced to the first count. This alleges that the plaintiff was and still is a corn merchant, and carried on an extensive business in buying wheat on

commission and otherwise. The slander charged is, "I sold wheat to Mr. Marsden, and he cheated me out of two bushels of wheat, and when I went to try the scales, he finger-rigged some screw about the scales, and threw on some weight at the same time, and I will not patronise him any more." These words are charged to have been spoken of the plaintiff in relation to his said trade and business, and the carrying on and conducting thereof by him. It cannot be, and indeed was not urged, that the speaking of these words was not proved. The objection taken in the rule is that no slander of the plaintiff in his business was proved : that the complaint that the defendant was cheated in one single transaction was no slander of his business : that managing scales was no part of the profession of a commission merchant ; and that no special damage was shewn.

It is true no special damage was alleged or proved. It need not be if the words are spoken of a tradesman in the conduct of his business. We cannot understand the force of the remaining objections, after reading the count and the evidence. The plaintiff avers he is a corn merchant carrying on extensive business in buying wheat on commission and otherwise ; the defendant says that he sold wheat to the plaintiff, who cheated him out of two bushels ; and the residue of the words spoken plainly imply that the cheating was effected by the false use of true scales and weights, or the use of false scales or weights, and the jury have found that the words were so spoken. The two cases of *Griffiths v. Lewis*, (one in 7 Q. B. 61, the other in 8 Q. B. 841,) are, we think, conclusive in the plaintiff's favour. We look upon this case as rather stronger ; for it alleges directly that defendant was cheated by the plaintiff in selling wheat to him, and attributes the plaintiff's cheating to the management of his scales in some manner or other to effect the fraud.

The defendant has little to complain of as to amount, when it is considered that he justified the language in each count, and offered no evidence to sustain his pleas.

We think the rule should be discharged.

Rule discharged.

THE NIAGARA FALLS INTERNATIONAL BRIDGE COMPANY  
AND THE NIAGARA FALLS SUSPENSION BRIDGE COM-  
PANY V. THE GREAT WESTERN RAILWAY COMPANY.

*Lease by American and Canadian companies—Right to pay rent in  
American currency.*

The plaintiffs, two corporations, declared on defendants' covenant to pay them \$22,500 for six months' rent, due on the 1st of June, 1863. Defendants pleaded that the premises leased were situate partly in the United States: that the plaintiffs had their place of business in the States, and that on the 1st of June defendants tendered to them there \$22,500 in lawful currency of the United States, which they refused; and the defendants brought into court \$15,525 of lawful money of Canada, which they averred was on the said 1st of June, and is equal in value to the said \$22,500 of the lawful currency of the United States.

The plaintiffs replied that the deed was executed in Canada: that one of the plaintiffs was a company incorporated and having its domicile here, and the other in the United States: that the rent reserved was payable in current money of this province; and that at the execution of the deed and hitherto the said \$22,500 was and had been always equal to \$22,500, and not at any time to \$15,525, of current money of the province; and that the tender made of the equivalent in American currency of the last-mentioned sum was not valid. On demurrer to the replication,

*Held*, that the contract being made in Canada, and mentioning no place where the payments were to be made, must be governed by our law: that the rent must be intended from the declaration to be payable in current money of Canada: that there was nothing in the plea to displace this intentment; and that the plaintiffs therefore were entitled to judgment.

THE plaintiffs declared upon an indenture made between them and the defendants, dated the 1st of October, 1853, for rent reserved and agreed to be paid by defendants to the plaintiffs for six months, ending on the first day of June last, amounting to \$22,500.

*Plea*, that the premises demised are situate partly in the United States of America: that the plaintiffs have their place of business and carry on their business entirely in the United States: that defendants have always been ready to pay to the plaintiffs the said sum of \$22,500, and on the 1st of June, 1863, tendered and offered to pay to the plaintiffs at their place of business the said sum of \$22,500, in lawful currency of the said United States, which by the law of the United States was a lawful tender of the said sum, and the plaintiffs refused to accept of the same; and defendants now bring into court here the sum of \$15,525 of lawful money of Canada, which last-mentioned sum the defendants aver was on the said first day of

June, and is equal in value to the said sum of \$22,500 of the lawful currency of the United States of America.

*Replication*, that the deed was made and executed by defendants to plaintiffs at Hamilton, in this province, and not elsewhere: that the Niagara Falls Suspension Bridge Company, one of the plaintiffs, is a company incorporated by the Parliament of this province, and has and always has had its domicile in this province and not elsewhere: that the Suspension Bridge Railroad floor and structure demised to defendants is situated partly in this province and partly in the United States, and the part in this province is the property of the Niagara Falls Suspension Bridge Company, and the part thereof in the United States is the property of the Niagara Falls International Bridge Company, incorporated by the law of the state of New York, one of the United States, and having its domicile in the United States; that the defendants are a company incorporated by the laws of this province, and are domiciled in this province and not elsewhere, and the rent reserved by the deed is payable in the current money of this province; and that at the time of the execution of this deed, and thence hitherto, the said sum of \$22,500 was and has always been equal to \$22,500 of the current money of this province, and not at any time to the sum of \$15,525 of the current money of this province as in the plea alleged; and that the tender of the equivalent of the last-mentioned sum in the currency of the United States, was not nor is a valid and legal tender of the sum of \$22,500.

*Demurrer*, because, 1. The tender pleaded is admitted, and no facts are set out which prevent such tender being an answer to the action.

2. (In substance) That the tender was properly made in the United States, and must be construed according to the law of the United States.

3. That the tender is a good answer to one of the plaintiffs, the American company, and therefore is a good answer to both plaintiffs.

4. That the deed, as stated in the declaration, does not shew that the rent is reserved in the current money of this province, nor is such the legal inference, as the deed is set out.

5. The mere fact that one of the plaintiffs is a company incorporated by the Legislature of this province, does not make that company domiciled in this province.

*Anderson*, for the demurrer, cited the *Carron Iron Co. v. Maclaren et al.*, 5. H. L. Cas. 416; *Taylor v. The Crowland Gas and Coke Co.*, 11 Ex. 1; *Adams v. The Great Western R. W. Co.*, 6 H. & N. 404.

*J. H. Cameron*, Q. C., contra, cited *Stor. Confl. L.*, secs. 278a, 292; *Sprowle v. Legge*, 1 B. & C. 16; *Kearney v. King*, 2 B. & Al. 301; *Don v. Lippmann*, 5 Cl. & Fin. 1, 18, 19, 20.

DRAPER, C. J., delivered the judgment of the court.

Upon these pleadings, taken altogether, it appears that the two plaintiffs are companies, one incorporated by the Legislature of the State of New York, the other by the Legislature of Canada: that the American company owns one-half of the suspension bridge, situate in the United States, and the Canada company the other half of the same bridge, situate in Canada: that the plaintiffs have jointly leased the whole bridge to the defendants at one rent of \$45,000 per annum, payable half-yearly, and that half a year's rent (\$22,500) fell due on the 1st of June, 1863: that the defendants are a corporation created by statutes of our Legislature, and are domiciled in this province, and not elsewhere; that the lease was made and executed at Hamilton, in this province, and not elsewhere, and contains the covenant to pay the rent on which this action is founded.

The plea sets forth that the two plaintiffs have their place of business and carry on their business entirely in the United States, and have their domicile there. The replication, as to the Canadian company, asserts that it is incorporated by the Provincial Legislature, and has and always had its domicile in this province, and not in the United States, or elsewhere out of this province, thus traversing the allegation of its domicile contained in the plea. This replication is demurred to by the defendants, and all facts therein stated and well pleaded are thereby admitted. If,

then, the domicile of the Canadian company be of importance to the decision, it is admitted to be in Canada.

Under these circumstances, the defendants' plea avers their readiness to pay the half-year's rent, and that on the day on which it fell due the defendants tendered to the plaintiffs "at their place of business aforesaid," that is, in the United States, the sum of \$22,500 "in lawful currency" of the United States, and which (*i.e.* the sum in that lawful currency) was by the law of the United States a lawful tender for that sum, and that the plaintiffs refused to accept the same; and the defendants now bring into court \$15,525 of lawful money of Canada, which last-mentioned sum was on the said first day of June, and is equal in value to the sum of \$22,500 of the lawful currency of the United States of America.

Unless the defendants had a right to make the payment to the plaintiffs in the currency of the United States, according to the law of that country, it is obvious on the face of the plea itself that it contains no answer; for the payment of \$15,525 in Canadian currency is averred to be equal to \$22,500 of American currency, and it is not averred or pretended that the sum paid into court is equal to \$22,500 in money, (*i.e.* in lawful current coin of either country.)

The whole question is, the right of the defendants, by going into the United States to make their tender, to pay a debt of \$22,500, due on a contract made in Canada, the country of the defendants' domicile, in the currency of the United States, which is worth \$6925 less than the debt amounts to in current money, (*i.e.* coin.)

The defendants have rested the right they claim on the ground that the tender was made at the domicile of the plaintiffs, as both carry on their business there, or that it was made to one of the plaintiffs at the unquestionable domicile of that one, and that a tender to one of two joint plaintiffs, if good, is a sufficient tender to both. The law is so, as the case of *Douglas v. Patrick* (3 T. R. 683) shews. If the case turns on the sufficiency of the tender in this respect, the defendants are entitled to our judgment.

But the question of the sufficiency of the tender of what

is in fact a less sum of money than the defendants covenanted to pay still remains.

We do not think this question is affected by the fact that the defendants' liability was for rent of property one-half in Canada and one-half in the United States. The action is founded on a covenant to pay a specified sum ; the question is, if there has been a legal tender of that sum.

We assume, because the fact was conceded during the argument, though it is not stated in terms in the pleadings, that the tender was not in any current coin ; but in some substitute for or representative of coin, arbitrarily adopted by the laws of the United States, and that the words "lawful currency of the United States" refer to and mean such substitute or representative. If the plaintiffs desire it, they may put this beyond doubt, and amend their replication by a direct averment to this effect.

No difficulty arises from any difference in value of the coins of the two countries, the word "dollars" in each meaning a coin of equal value ; the law of the United States on which the defendants rely not appearing to be of that character denounced by a modern writer when he says, "Profligate governments having until a very modern period seldom scrupled, for the sake of robbing their creditors, to confer on all other debtors a license to rob theirs, by the shallow and impudent artifice of lowering the standard ; that least covert of all modes of knavery, which consists in calling a shilling a pound, that a debt of a hundred pounds may be cancelled by the payment of a hundred shillings," (Mill's Political Economy, vol. ii. p. 8.)

The contract being made in Canada, and mentioning no place where the stipulated payments are to be made, is to be governed in its construction by the laws of Canada, and not of any foreign country. The court must intend from the declaration that the rent was payable in current money of Canada, though it is not in words so set forth. There is nothing in the plea sufficient, in our judgment, to displace this intendment, and therefore, as by the plea itself it appears that a tender amounting only to \$15,525 has been made, it affords no answer to an admitted claim of \$22,500.

We rely on the authorities cited in argument, Kearney v. King, (2 B. & Al. 301;) Sprowle v. Legge, (1 B. & C. 16;) Story's Conflict of Laws, secs. 272, 278, and 379, to which we add sec. 317; Don v. Lippmann, (5 Cl. & F. 1, 12, 13.)

We think the *lex loci contractus* must govern, and that the defendants have no more legal than moral right to pay \$6,925 less than they agreed to pay in discharge of their undertaking.

Judgment for plaintiffs on demurrer.

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HUGHES ET AL. V. GEORGE WILLIAM SNURE AND JACOB SNURE.

*Promissory note—Set-off—Consol. Stats. U. C., ch. 42.*

In an action against the maker and indorser of a promissory note, *Held*, that neither defendant could plead separately a set-off not arising out of or connected with the note.

DECLARATION on a promissory note, made by the defendant George W. Snure, payable to the other defendant, Jacob Snure, or order, and by him indorsed to the plaintiffs.

Each of the defendants pleaded a separate plea of set-off, on the common money counts, for goods, work and labour, and account stated; and the plaintiffs demurred to each of these pleas, assigning as causes of demurrer that neither of the pleas aver or shew that the set-off respectively therein pleaded arose out of or was connected with the promissory note declared upon, or with the consideration thereof.

*Scott*, for the demurrer, cited Consol. Stats. U. C., ch. 42, sec. 32; Metropolitan Bank v. Snure et al., 10 C. P. 24; Nowlan v. Spawn et al., 16 U. C. R. 334; Byles on Bills, 3rd Am. Ed., p. 289, note.

*M. C. Cameron*, Q. C., contra, cited Hamilton v. Holcomb, 12 C. P. 38, In Appeal, 9 U. C. L. J. 235.

DRAPER, C. J., delivered the judgment of the court.

The act of 1835, 5 W. IV., ch 1, first enabled the holders of a bill of exchange or promissory note to sue all the parties thereto in one and the same action. It contained this provision relative to set-off—(sec. 6) "that in any such action any person or persons sued shall be entitled to set off

his or their demands against the plaintiff, in the same manner as though such defendant or defendants had been sued in the form heretofore used." This provision, with some others, was repealed in 1840, by 3 Vict., ch. 8, and the following as to set-off was substituted for it: "That in any such action the person sued shall be entitled to set-off against the said plaintiff any payment, claim or demand, whether joint or several, which in its nature and circumstances arises out of or is connected with the bill or promissory note which is the subject of such joint action, or the consideration thereof, in the same manner and to the same extent as though such defendant had been sued in the form heretofore sued; and if the jury shall allow any demand as a set-off, and still find a balance in favour of the plaintiff, they shall state in the verdict the amount which they allow to each defendant as a set-off against the plaintiff's demand."

The Consolidated Statute of Canada, which embodies the foregoing provision as to joining the parties in one action, and the last relating to set-off, (Consol. Stats. U. C., ch. 42,) contains this further section, (sec. 26,) which was also in the act of 1835: "The rights and responsibilities of the several parties to any such bill or note, *as between each other*, shall remain the same as though this act had not been passed, saving only the rights of the plaintiff, so far as they may have been determined by the judgment."

It has been urged that, connecting the last-cited section with the one relating to set-off, the proper result to be arrived at is, that without the statute each defendant would have had a right of several set-offs as against the plaintiff, but that by this section a new right is conferred on defendants, namely, that of pleading a joint set-off, while each defendant may still plead any and every claim he has separately against the plaintiff, as in these pleas.

We do not adopt this argument. The first act gave to each defendant sued in a joint action under the statute a general right of set-off against the plaintiff. The difference between the situation of a plaintiff in an ordinary action suing several debtors on a claim for which each was respon-

sible on a liability common to them all, and that of a plaintiff suing the several parties to a bill or note, who were liable in different characters and on distinct grounds, in the same action, appears to us to have been overlooked. In the former case he could only recover that for which each and all of the defendants were equally liable, and was only liable to a set-off of that for which he was liable to all the defendants collectively. In the latter he can only sue on the bill or note, and whatever several claims he may have against each defendant, he cannot advance them. If he sues the maker and indorser, he cannot join in such suit a demand against either for goods sold, &c. &c., to the one. But if they can set off each a several demand against him, then, although he may have a demand against each separately of even a greater amount, he cannot avail himself of it. The injustice which might arise, and probably had arisen from this state of the law, affords to our minds a satisfactory reason why the section of the first act as to set-off was repealed, and that now in force substituted; and construing it on that assumption it appears to us the pleas demurred to are bad. We think the Legislature, having repealed the first provision, intended to give a right of set-off joint or several, but limited to such "payments, claims and demands," as any one or more of the parties sued had against the plaintiff, and which, in the words of the section, "arose out of or was connected with" the cause of action, namely, the bill or note sued upon, or the consideration thereof. There could be no injustice in allowing such a claim as a bar *pro tanto* to the plaintiff's suit. The defendants collectively are liable for no more than can be recovered on the bill or note sued on; and if by the dealings between the plaintiff and any one or more of them in relation to such bill or note the same has been satisfied in whole or in part, it ought to enure to a corresponding extent to prevent a recovery against any of them. Their rights and responsibilities as between one another will remain untouched; the plaintiffs' will be determined by the judgment.

Judgment for plaintiffs on demurrer.

## THE QUEEN V. MCQUARRIE.

*False pretences.*

An indictment charging that defendant by false pretences did obtain *board* of the goods and chattels of the prosecutor. *Held*, bad, the term "board," being too general.

At the Court of Quarter Sessions held at Whitby on the 9th of June, 1863, Allen McQuarrie was convicted upon the following indictment:—

"COUNTY OF ONTARIO, } The jurors of our Lady the Queen  
To wit: } upon their oath present that Allen  
McQuarrie, on or about the twentieth day of March, in the  
year of our Lord one thousand eight hundred and sixty-  
three, at the township of Pickering, in the county of  
Ontario, unlawfully, fraudulently, and knowingly, by false  
pretences did obtain for himself and men from one William  
Coe board of the goods and chattels of the said William  
Coe, with intent to defraud, against the form of the statute  
in such case made and provided, and against the peace of  
our Lady the Queen, her Crown and dignity."

*R. P. Crooks*, on behalf of the defendant, objected that the indictment did not disclose an indictable offence, inasmuch as the term board was too vague and indefinite, and could not be considered in law to be of the goods and chattels of the prosecutor. The question was reserved whether defendant could be properly convicted upon this indictment, and upon the evidence, which it is not material to notice.

*Stephen Richards*, Q. C., for the Crown, cited *Regina v. Gardner*, 1 Dears. & Bell, 40.

*R. P. Crooks*, contra, cited *Rex v. Walker*, 6 C. & P. 657; *Rex v. Goodhall*, Russ. & Ry. 461; *Regina v. Robinson*, 28 L. J. M. C. 58.

DRAPER, C. J., delivered the judgment of the court.

We are of opinion that the indictment is bad, and that the defendant ought not to have been convicted.

The Consolidated Statute of Canada, ch. 92, sec. 71, enacts that "If any person, by any false pretence, obtains

from any other person any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, such offender shall be guilty of a misdemeanour." And chapter 99 of the same statutes, in section 51, gives a form of indictment for false pretences, in which the charge is that the accused by false pretences did obtain from one C. D. six yards of muslin, of the goods and chattels of the said C. D.

If an indictment were preferred for obtaining goods and chattels, or a chattel of the prosecutor, not defining them or it, we have no doubt it would be insufficient. There must be the same particularity as in larceny, that the party may know certainly what he is charged with stealing or obtaining by false pretences.

It may be well doubted whether, if the indictment had charged the defendant with having by false pretences obtained a dinner of the goods and chattels of the prosecutor, it would not be too general. But the term "board" is more general still. It implies a succession of meals obtained from day to day, or from week to week, or from month to month, &c. &c., and it may be said that each meal obtained under false pretences is a distinct offence. The case of the Queen v. Gardner (1 Dears. & B. 40, reported also in 2 Jur. N. S. 598) contains a form of indictment more suitable to the offence intended to be charged.

We are also not satisfied that the conviction is sustained by the evidence; but we do not rest our judgment on that.

For the insufficiency of this indictment we think judgment should be arrested.

There is a similar indictment against this defendant in a case in which Thomas Totterdale is prosecutor, on which, for the same reason, the judgment must be arrested.

Judgment arrested.

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## HALL V. DUNCAN ET AL.

*Ship's husband—Duties of—Proof of performance.*

In an action upon an alleged agreement by defendants, that if the plaintiff would purchase for them a certain vessel, and would perform the duties of a ship's husband in respect of her, they would pay him five per cent. on her gross earnings up to the time of the last voyage for which he should as such ship's husband prepare her :

*Held*, that upon the evidence set out below the plaintiff's contract was not shewn to have been performed, and the jury having found in his favour a new trial was granted, with costs to abide the event.

THE declaration stated that defendants, being desirous of purchasing a vessel called the *Syrius*, agreed that if the plaintiff would use all due diligence in purchasing the vessel for them, and would perform the duties of a ship's husband for them in respect of the said vessel, that they would from time to time pay him a commission of five per cent. on the gross earnings of the vessel, up to the time of the termination of the last voyage for which he should, as such ship's husband, prepare her : that through the plaintiff's exertions the vessel was purchased on behalf of defendants, and the plaintiff acted as ship's husband for a long time, and prepared the vessel for three voyages, and her gross earnings during that time amounted to \$9,567.28, on which the plaintiff was entitled to receive the said commission. Breach, non-payment.

Common counts were added, for work and labour as ship's husband and agent, and for commission in drawing, accepting, and indorsing bills of exchange for defendants, and for money paid, &c.

*Pleas*, to the first count, that the commission payable to the plaintiff on the second voyage of the said vessel amounted to \$107, 72c., and no more, of which before action brought defendants paid the plaintiff \$94, 29c., and tendered the residue, \$13, 43c., to the plaintiff, which he refused, and they bring the same into court ; and as to the third voyage, defendants say that the plaintiff did not perform the duties of ship's husband for that voyage. To the remaining counts, never indebted. Issue.

The case was tried at the assizes for York and Peel, in April, 1863, before *Hagarty*, J., when a verdict was found for the plaintiff for £50.

*Harman* obtained a rule *nisi* for a new trial on the law and evidence, and because the verdict was perverse.

*Robert A. Harrison* shewed cause, and cited *Creighton v. Chambers*, 6 C. P. 282; *Brown v. Malpus*, 7 C. P. 185; *Abbott on Shipping*, 8th ed. 106; *Story on Agency*, sec. 35, and notes; *Story on Partnership*, sec. 418; *Kent Com.* vol. iii. 5th ed., p. 157; *Paley on Agency*, secs. 108, 109, and notes.

*Eccles*, Q. C., and *Harman* supported the rule, citing *Woods v. Cox*, 17 C. B. 280; *Broad v. Thomas*, 7 Bing. 99; *Sanderson v. Kingston Marine R. W. Co.*, 4 U. C. R. 340; *Add. Con.* 448.

The facts of the case sufficiently appear in the judgment of the court, delivered by

DRAPER, C. J.—By the pleadings the contract is admitted, and to the first count there is a plea setting up a tender and payment into court as to the second voyage, and denying performance by the plaintiff of the duties which according to the contract he admits he was to perform for the third voyage, namely, the duties of ship's husband.

Both parties seem to put the first voyage out of the question. The plea says nothing about it, and the plaintiff gave no evidence in regard to it, although it appeared there had been two voyages on the inland waters before the last, which was from Sarnia and Quebec to Liverpool, was undertaken. The plaintiff's claim is for five per cent. commission on the gross earnings for the three voyages. His evidence was to shew that he had discharged the duties of ship's husband for the third voyage, and it was this alone that the defendants disputed, admitting that the gross earnings for this third voyage were \$4,692.

It seems, then, the first question was, What were the duties of ship's husband? The only expression in the declaration which bears on the question is the claim of five per cent. on the gross earnings of the vessel up to the termination of the last voyage for which the plaintiff should "as such ship's husband prepare her." In *Abbott on Shipping*, part 1, ch. 3, 10th ed. p. 73, the duties of a ship's husband are said

to be to "see that the ship is properly repaired, equipped, and manned, to procure freights or charter-parties, to preserve the ship's papers, to make the necessary entries, adjust freight and averages, disburse and receive moneys, and keep and make up the accounts as between all parties interested;" and this definition was submitted to the jury, coupled with the question whether the plaintiff substantially performed the duties he contracted to perform.

In Story on Agency, sec. 35, it is said the ship's husband is understood to be the general agent in regard to all the affairs of the ship in the home port, among which he states, "to direct all proper repairs and equipments, and outfits for the ship; to hire the officers and crew; to enter into contracts for the freight or charter of the ship, if that is her usual employment; and to do all acts necessary and proper to prepare and *despatch her* for and on her intended voyage;" while in Bell's Commentaries, secs. 411, 429, the fourth head of the duty of ship's husband is said to be "to see to the regularity of all the clearances from the custom-house, and the regularity of the registry."

Mr. Collyer, in his Treatise on Partnership, p. 681, defines the duties of a ship's husband "to see to the proper outfit of the vessel, to have a proper master, mate and crew; to see to the furnishing of provisions and stores; to see to the regularity of all clearances from the custom-house; to settle the contracts; to enter into proper charter-parties, or engage the vessel for general freight; to settle for freight, and adjust averages with the merchant; to preserve proper certificates and documents in case of future disputes with insurers or freighters, and to keep regular books of the ship."

But the contract as stated and admitted limits the duty to *preparing the vessel for her voyages*. By the evidence it appeared that the last voyage was to Liverpool. She was repaired and principally though not entirely fitted out at Detroit. Thence she was to proceed to be loaded up the Detroit River to Sombra and Sarnia, at which latter place a new cabin was put into her. She had to be towed up, and money was requisite to pay for this and other expenses incurred by the master. The provisions for the voyage to

England and back were procured, according to a witness for the defence, at Sarnia, this witness acting as agent for the defendants for everything requisite from the time the vessel left Sarnia to go to Detroit until she sailed for Quebec, including caulking her to stop a leak, which shewed itself at Port Dalhousie on the voyage to Quebec, and having her register changed at Montreal, for which purpose she was inspected and remeasured.

There was conflicting evidence as to what the plaintiff did in preparing the vessel at Detroit. One of the owners was present at the contracting for repairs and alterations; and according to the evidence of one witness taking part in it, and it was sworn the plaintiff only visited the vessel or looked after the progress of the repairs at Detroit occasionally during twelve days. On the other hand, the correspondence put in shewed that the defendants were employing the plaintiff to prepare the vessel, as in fact their pleading admitted.

The learned judge left the question as one of fact to the jury, whether on or rather for the last voyage he did perform the duties stated in the declaration; and, as he observed, to save the expense of another trial, he asked the jury to name a sum to recompense the plaintiff for what he actually did, though the evidence was very loose. If they found any such sum, he reserved leave to the plaintiff to move to enter a verdict for it, if the court should think the plaintiff could recover on the common counts, though the entire contract was not performed. The jury gave a general verdict for the plaintiff, and £50. The learned judge had stated as his opinion that if the contract was entire the plaintiff could not recover, unless he did that which was the consideration for his receiving the stipulated commission.

We take the same view of the law as was expressed by the learned judge at the trial in this respect; and in the argument before us on the defendants' rule *nisi* for a new trial the plaintiff's counsel rested the claim to recover on the contract, and the plaintiff having done all on his part that was necessary to entitle him to the commission claimed. In our view of the evidence it failed to shew such perform-

ance. The vessel had not got her sails when she left Detroit for Sarnia, nor was her new cabin erected. But from the moment she went up the river the plaintiff furnished no help, or superintendence, or money, and but for Turnbull's interference the master and probably the crew would have left her.

The jury appear to have forgotten or to have disregarded the statement of the law made to them by the learned judge as to performance of the plaintiff; and instead of finding how much the plaintiff's services were worth, if he was entitled to remuneration for what he did, though he had failed in doing what he engaged, they have given a general verdict affirming his performance and right to recover on the agreement.

In this we think they were clearly in error, and therefore there must be a new trial. We think the costs should abide the event.

Rule absolute.

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### PATTON V. EVANS.

*Overholding tenant—Consol. Stats. U. C., ch. 27, secs. 58, 63.*

A tenancy for an indefinite term at a monthly rent, subject to be put an end to by either party by a month's notice, is not within the Consol. Stats. U. C., ch. 27, sec. 63; and a precept to put the landlord in possession was therefore refused.

The tenancy intended by that act is not one which can only be put an end to by notice, but one which comes to an end by the effluxion of a stipulated period, or perhaps by the happening of a particular event, as under a lease for the life of the lessor.

*Lays* moved in this case for a precept to put the plaintiff in possession, proceedings having been taken against defendant as an overholding tenant. The motion had been made in Chambers, and referred to the full court.

*Osler* shewed cause in the first instance, citing *Adams v. Bains*, 4 U. C. R. 157.

The facts sufficiently appear in the judgment.

DRAPER, C. J., delivered the judgment of the court.

We gather from the evidence that the defendant has been in possession for a considerable time as a tenant to the

plaintiff, paying rent monthly, but not holding for a definite term; for, as we understand, either party could put an end to the tenancy by giving a month's notice, and without a month's notice the plaintiff cannot eject the defendant, nor can the defendant relieve herself from the obligation to pay rent without a similar notice of her intention to leave, followed by her leaving the premises.

The question then is whether, having received notice to quit in due form, she is to be deemed "a tenant after the expiration of her term," wrongfully refusing to go out of possession upon demand made.

It appears to us that a tenancy which may be put an end to by a notice to quit, and which, as far as appears, can only be put an end to in that way, is not a tenancy for a term within the meaning of the act: that the words "expiration of his term," mean that the term comes to an end by the effluxion of a stipulated period, or possibly by the happening of a stipulated event, as a tenant taking for the term of the life of the lessor, who has only a life-interest, and dies. We say possibly, because we are not now called upon to say whether the statute would apply in that case.

But a tenancy put an end to by notice to quit seems to us a different thing, such notice being an act necessary to be done, and for doing which no certain date is fixed. The expiration of a term in its plain sense depends on a contract or stipulation made by the parties when the term was created, and the time will arrive when the term will cease, without any further act of either party. Then if a proper notice to quit be given, the right of possession accrues to the landlord without other demand in writing, while the statute speaks of such a demand as a thing to be done at or after the expiration of the term, before the special remedy can be claimed.

We think the proper construction of the act is to confine its operation to cases where the tenant holds over after the expiration of his term, and becomes a trespasser, and liable to be ejected without notice or demand if the ordinary remedy by ejectment is taken. We are strengthened in this conclusion by observing that in the special remedy granted

to a landlord under the 58th section of the Ejectment Act, the affidavit there must shew "that the interest of the tent has *expired*, or been determined by regular notice to quit, (as the case may be,)" drawing the very distinction between an expiration of the term and a determination of the tenant's interest by a notice to quit.

We think the rule for a precept to put the landlord into possession should be refused.

Rule refused.

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PETRIE V. TANNAHILL.

*Amendment.*

The plaintiff sued on an agreement by defendant to store with him all defendant's wheat during the season, alleging as the consideration that the plaintiff would store it, and would rent another storehouse, and claiming damages for the expense of such renting. At the trial the plaintiff's witnesses failed to prove that part relating to the storehouse, and the declaration was amended by striking it out. The plaintiff was then called for the defence, and stated the agreement as at first set out. His counsel did not amend again, and the jury found for the plaintiff, adding that they believed the storehouse to be in the contract.

The court in term allowed the declaration to be restored to its original form, and refused a new trial.

THE declaration stated that the plaintiff was possessed of a storehouse and wharf for storing and shipping grain, and that defendant carried on business as a commission merchant in purchasing grain: that on, &c., by an agreement made between the plaintiff and defendant, in consideration that the plaintiff would store and ship for defendant all the grain which defendant should buy during the fall of 1861, in and from the plaintiff's said storehouse, defendant promised the plaintiff to store with him all the grain which he should purchase at Belleville during the fall of 1861, and to pay for storing and shipping two cents per bushel. Averment of plaintiff's readiness, and that the plaintiff did in part performance receive, store, and ship 283 bushels of grain, and that defendant purchased at Belleville during the said fall other 34,000 bushels of grain, yet defendant did not deliver them to plaintiff to be stored and shipped, &c.

Second count for storage.

*Pleas.*—1st. Did not promise. 2nd. To second count, payment. 3rd. To second count, set-off.

The declaration originally contained a statement that it was part of the consideration for the defendant's promise that the plaintiff would rent another storehouse in Belleville further down the river Moira, and averred that the plaintiff had done so, and claimed damages for the expense of such renting.

The trial took place at Belleville, in March 1863, before *Hagarty, J.* It was proved that about the end of July or beginning of August, 1861, the plaintiff and defendant were talking about storing grain, and defendant asked if the plaintiff would store at two cents per bushel. The plaintiff said he would for all the grain the defendant might ship that fall. Defendant asked would the plaintiff engage there should be six feet of water, and the plaintiff said he would. Plaintiff asked was it a bargain, defendant said it was. Defendant did send some grain, and afterwards removed it by teaming. The plaintiff objected, and said to defendant he had warranted six feet of water, and there it was, and that defendant was to store all his grain for the season; and said defendant had ruined him, that he (plaintiff) had a storehouse for the purpose. The witness who proved the first conversation said that the plaintiff bid him "to remember that bargain." Other conversations of defendant were proved, confirming the fact that he had made a bargain with the plaintiff, but not stating the particulars, except that he had agreed with the plaintiff to do all his business for the season, and that the plaintiff should not store for any one but himself. It was proved that defendant took in about 30,000 bushels that fall at a storehouse, in the hiring of which defendant was jointly interested with another party, and that the plaintiff rented for one year another storehouse besides the one he had when the agreement with the defendant was made.

It was objected for the defence that the portion of the alleged consideration for the defendant's promise, that the plaintiff would rent another storehouse, was not proved to have been part of such conversation, and so there was a

variance. The learned judge allowed the declaration to be amended by striking out the part referring to such renting.

It was proved that defendant had sent a writing to the plaintiff, dated 13th of July, 1861, asking the plaintiff to sign it. It was in the form of an offer to defendant to store his grain at two cents per bushel till the close of navigation, same price for winter storage : that is, to take in, store, and deliver free on board at the above rate of two cents, and to guarantee six feet of water to the mouth of the harbour from his store. The plaintiff admitted he would not sign the writing, asking if his word was not as good as his writing, and when it was remarked to him that he could not expect a man to store without a written bargain, he replied that he thought defendant was a gentleman, but did not say that anything in the writing was against or beyond the bargain.

The plaintiff was then called as a witness for the defence, and he swore he would not sign the writing because he and defendant differed about the winter business : that he wanted three cents and defendant offered two and a half cents, and this was before they made their bargain, which they did after two or three conversations ; and he distinctly proved the bargain as originally set out in the declaration, in his examination in chief.

After this the defendant's counsel urged that the declaration as amended was not in accordance with the plaintiff's own statement of the agreement. The plaintiff's counsel, after speaking of asking for a further amendment to restore what had been struck out, elected to let it remain as amended.

The learned judge left the case to the jury on the evidence as given by the plaintiff, considering that nothing substantial turned upon the plaintiff's taking or omitting to take the new warehouse, but asked the jury to say in their verdict whether the plaintiff was or was not by the contract to hire or provide a second warehouse.

The jury found for the plaintiff, damages \$375, adding these words, "believing the storehouse to be in the contract."

In Easter Term *M. C. Cameron*, Q. C., obtained a rule

*nisi* for a new trial, the verdict being contrary to evidence, and for variance between the plaintiff's cause of action found by the jury, and on the ground of surprise, and on affidavits.

The only affidavit filed was that of the defendant himself. He denied making any agreement with the plaintiff in 1861. He stated that in July, 1861, he made a verbal proposal to the plaintiff, involving the plaintiff's undertaking to remove a bar in the river Moira to ensure a certain depth of water, and that shortly afterwards the plaintiff orally agreed to the proposal, and then defendant drew up a writing, being that produced at the trial: that the plaintiff then declined to sign the writing, and said that if after the removal of the bar there would not be quite the depth of water expected he would hire a small store below Ridley's wharf, where the bar rose, that might be used if required: that the plaintiff never signed the writing and gave no explanation though defendant repeatedly waited upon and sent for him: that while waiting for an answer defendant sent some grain to the plaintiff for storage: that after some time defendant gave the plaintiff notice that he withdrew his offer, and engaged another storehouse. He denied the truth of the first witness' (Taylor) account of the agreement, and stated that since the trial he had found a receipt of Taylor's for delivering wood, which was dated 15th of November, 1861; but the report of the learned judge of Taylor's evidence contained nothing to which this date or receipt would apparently apply.

*Beaty* shewed cause, and filed two affidavits, one of the plaintiff, denying the defendant's assertion that there was no agreement, and reaffirming his own statement at the trial; and one from Taylor, reaffirming his evidence given at the trial, and denying the truth of defendant's statement that he (Taylor) was not present at any meeting between plaintiff and defendant in July or August, 1861.

*Beaty* asked leave to amend the declaration by restoring it to the condition in which it was originally framed. He cited *Parsons v. Alexander*, 5 E. & B. 263; *Wilkinson v. Sharland*, 11 Ex. 33.

*M. C. Cameron*, Q. C., in support of the rule, cited *Weld*

v. Baxter, 27 L. T. 190. He referred also to the note at the foot of page 812, of 2 Jur. N. S., *The Deposit and General Life Insurance Company v. Ayscough*, in which, after judgment on demurrer given for the plaintiff, the defendant's counsel asked for leave to amend his plea, which the court refused, as leave to amend had been offered during the argument, and had been declined: *Hall v. Thompson*, 9 C. P. 257, where the court refused after verdict to amend a plea at law by making it a plea on equitable grounds, until they were satisfied that on the facts brought out at the trial an equitable defence was proved.

DRAPER, C. J., delivered the judgment of the court.

The two cases cited for the plaintiff amply establish the authority of the court to make the amendment prayed by the plaintiff, and so far as we can judge it would be unjust to refuse it. Upon the evidence given for the plaintiff as sustaining his right to recover, the cause of action was proved as it appears on the declaration after the amendment made at *nisi prius*. But the defendant called the plaintiff as a witness, and then the plaintiff proved the cause of action as stated in the declaration as at first framed. Either way he shewed a right to recover, and the jury have affirmed his right according to his own statement on oath. He could not by our law offer himself as a witness to prove his own case, and hence this dilemma, by which the defendant seeks to defeat him altogether, for *toties quoties* the case was tried the same difficulty might occur.

As to the affidavits, they contain nothing to call for our interference, or to prevent the amendment. The defendant does not notice the proofs of his own admissions of having made an agreement with the plaintiff.

We are of opinion the amendment should be made, and the rule for new trial discharged.

Rule discharged.

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IN RE MCCUTCHON AND THE CORPORATION OF THE CITY OF  
TORONTO.

*Sewers—By-law to regulate—22 Vict., ch. 99, sec. 20, sub-secs. 18, 20.*

*Held*, that the 22 Vict. ch. 99, sec. 290, sub-secs. 18, 20, giving power to municipal corporations relating to sewers, applied to sewers already constructed by general taxation, not to those only which might afterwards be built.

The 18th sub-section authorises a by-law to compel the draining "of any grounds, yards, vacant lots, cellars, private drains, sinks, cesspools, and privies," and to assess the owners with the costs thereof if done by the council on their default; and the 20th sub-section "for charging all persons who own or occupy property which is drained," or required to be drained into a common sewer, with a reasonable rent for the use of the same. The by-law in question enacted that "all grounds, yards, vacant lots, or other properties abutting on any street" should be drained, and fixed the rent to be paid. *Held*, not objectionable as including other properties than those mentioned in the statute, for if the word "property" in the 20th sub-section could include only the kinds of property mentioned in the 18th, it might receive the same construction in the by-law.

The court inclined to think that the owner or occupier of the property might legally be allowed to commute for the annual rent by payment of a fixed sum, and refused therefore to quash the clause authorising such an arrangement.

The sewer rent not being a charge upon the land, *Held*, that payment of it could not be enforced by the same means as the ordinary assessments.

The sixth section of the by-law required all grounds, &c., not already drained, abutting on any street with a common sewer, to be drained into the same within fourteen days from the advertising of the by-law for one week; the seventh section imposed a penalty on any one of not less than \$1 nor more than \$10 for each month he should omit to do so; and the eighth provided for enforcing payment by distress or imprisonment not exceeding thirty-one days.

*Held*, that these sections must be quashed, for the 18th sub-section above mentioned shewed how the parties should be compelled to drain, *i.e.* by the council doing the work and assessing them for the cost; and the infliction of a penalty for each month, and imprisonment for thirty-one days, were wholly unauthorised.

A subsequent by-law added to the eighth section above mentioned a proviso, that any person thereby required to construct a drain who should not do so, but should be willing to pay the same rent as if he did use the sewer, should be exempt from the penalties. *Held*, that as the penalties were held illegal, this clause, founded on the assumed liability to pay them, must also be quashed.

*Robert A. Harrison*, on behalf of the relator, obtained a rule *nisi* to quash the first, third, fourth, fifth, sixth, seventh, and eighth sections of by-law No. 295, or to quash the said by-law *in toto*, and also to quash the whole of the by-law No. 304, of the city of Toronto, or sections 1 and 2 thereof.

By-law No. 295 is set out as by-law No. 28, in the case of *Moore v. Hynes, et al.*, (ante, page 109).

By-law No. 304 was passed to amend No. 295, first, by

adding to the third section thereof the following words: "But where a ground, yard, vacant lot, or property is situate at the intersection of two streets, or at the intersection of a street with any lane or alley, upon each of which streets, lanes, or alleys there is a common sewer, the front only of such grounds, yards, vacant lots, or property, together with so much of the flank thereof as the said flank exceeds eighty feet, shall be assessed for the rental hereby imposed." And secondly, by adding after the end of the eighth section the following words: "Provided always, in case any person hereby required to construct a drain into any common sewer does not do so, but is willing to pay the like annual rental or sewerage rate as if he did use such sewer, he shall not be liable to the penalties in this act mentioned for not using such common sewer hereinbefore prescribed, so long as he pays such rental or sewerage rate; and every person desirous of paying such rental shall by signing or sealing this by-law, or any copy thereof, be bound to pay such rental, and may be sued therefor as for a debt due to the corporation, or the same may be levied by distress of his goods and chattels as for a rent, or for general taxes and assessments payable to the corporation; and any person failing to pay such rental, or any part thereof, on or before the first day of December, in each year, shall be liable to the penalties hereinbefore mentioned, as if this proviso had not been made; and provided also, that nothing in this by-law contained shall repeal or be construed to repeal any sanitary by-law of the corporation, or be held to curtail or interfere with the duties or powers of the Board of Health, or any regulations thereof, or of the corporation relating thereto." This was passed on the 21st of November, 1859.

The rule called upon the corporation to shew cause "why said by-law, No. 295, should not be quashed, with costs, because the statute under which said by-law was passed was not intended to apply and does not apply to common sewers at the time of the passing thereof constructed, the costs of which had been defrayed by general taxation; and because the same is in other respects illegal and informal.

Or why section 1 of said by-law, No. 295, should not be

quashed, with costs, because of excess of authority, in this, that while the statute authorises the passing of a by-law by the corporation of a city for compelling the draining of any grounds, yards, vacant lots, cellars, private drains, sinks, cesspools and privies, the said by-law enacts, 'that all grounds, yards, or vacant lots, or other properties (which would include properties other than those specified in the statute) abutting on any street, or any portion of any street in the city of Toronto, through which a common sewer has heretofore been constructed, and which is opposite to such common sewer;' and because of uncertainty in this, that 'the other properties' intended are not sufficiently specified in the by-law, and because the grounds, yards, and vacant lots intended, are not sufficiently designated.

Why section 3 of the said by-law, No. 295, should not be quashed, with costs, because, if the object of said section is to defray the expense of constructing said sewers, that object, for all that appears, was previously attained by general taxation, and so some citizens would be twice taxed for the construction of said sewers; and because said by-law in said section assumes to charge persons who own or occupy property required to be drained into sewers, (whether the drains have been constructed or not by the city council,) with a rent for the use of a thing which does not exist, and so cannot be used; and because the rent imposed in said section, instead of being a reasonable one applicable to the case of each particular property, is an arbitrary one, applicable to certain sections of the city and properties therein described.

Why section 4 of the said by-law No. 295 should not be quashed, with costs, because, while the statute only enables city corporations to charge persons who own or occupy property which is drained into a common sewer, (or which by any by-law of the council is required to be drained into a common sewer,) with a reasonable rent for the use of the same, no power is given for the commutation of that rent into a bulk sum, which said by-law in such section assumes to be the case.

Why section 5 of the said by-law, No. 295, should not be quashed, with costs, because, while power is given to city

corporations by law to charge persons who own or occupy property which is drained into a common sewer, or which by any by-law of the council is required to be drained into such sewer, with a reasonable rent for the use of the same, and for regulating the time or times and manner in which the same is to be paid, no remedy other than the ordinary one of action is given in the event of non-payment; and certainly not assuming power of distress and sale, as in the case of the collection of ordinary taxes unpaid, which the said by-law assumes to be the case.

Why section 6 of said by-law, No. 295, should not be quashed, with costs, because of objections thereto similar to those enumerated as applicable to section 1 of the same by-law, and because the said section (6) does not direct by whom said grounds, &c., are to be drained, and because the said section is unreasonable, in requiring all grounds, yards, vacant lots, and property mentioned in said section to be drained within fourteen days from the publication of the by-law by advertisement in any public newspaper in the city for one week; and because the said section is in other respects illegal and informal.

Why section 7 of said by-law, No. 295, should not be quashed, with costs, because the only penalty under the statute upon persons neglecting to drain grounds, yards, &c., required to be drained, is that the city council may cause the drains required to be constructed, and assess the parties chargeable therewith with the costs thereof, and it confers no authority upon city corporations to make such neglect a penal offence, punishable by continuing fines for all time to come, for each month that the person chargeable shall omit to do what is required of him, which said section assumes to be the case.

Why section 8 of said by-law, No. 295, should not be quashed, with costs, because the same is dependent entirely upon section 7 of the same by-law, and if section 7 be illegal and quashed, section 8 must follow it, and be likewise quashed.

And why by-law No. 304 should not be quashed, with costs, because the same is dependent entirely upon by-law

No. 295, and a part thereof, and if by-law No. 295 be illegal and quashed, by-law No. 304 must follow it, and be also quashed.

Or why section 1 of by-law No. 304 should not be quashed, with costs, because the same is entirely dependent upon and a part of section 3 of by-law No. 295, and if section 3 of by-law No. 295 be illegal and quashed, section 1 of by-law No. 304 must follow it, and be also quashed.

Why section 2 of by-law No. 304 should not be quashed, with costs, because the same is entirely dependent upon and a part of section 8 of by-law No. 295, and if section 8 of by-law No. 295 be illegal and quashed, section 2 of by-law No. 304 must follow it, and be also quashed."

*J. H. Cameron*, Q. C., shewed cause.

DRAPER, C. J., delivered the judgment of the court.

Both these by-laws were passed before the Consolidated Statutes of Upper Canada came into force, and after the passing of the Municipal Institutions Act, 22 Vict., ch. 99, (1858.) Sec. 290, sub-sec. 18, of this act gives power to the council of every city to pass by-laws "for *compelling* or regulating the filling up, *draining*," &c. &c., "of any grounds, yards, vacant lots, cellars, private drains, sinks, cesspools, and privies; and for *assessing* the owners or occupiers of such grounds, yards, or of the real estate on which the cellars, private drains, sinks, cesspools, and privies are situate, with the costs thereof if done by the council on their default." And sub-sec. 20, "For *charging* all persons who own or occupy *property* which is *drained* into a common sewer, or which by any by-law of the council is required to be drained into such sewer, with a reasonable rent for the use of the same, and for regulating the time or times and manner in which the same is to be paid."

The general objection taken to the whole by-law is, that the statute was not intended to nor does it apply to common sewers constructed at the time of the passing thereof, the costs of which had been defrayed by general taxation.

We do not perceive that the fact, (admitting it to be

shewn,) that there were common sewers constructed when the act was passed, and that the general taxes or funds of the city had defrayed the cost thereof, necessarily or even reasonably leads to the conclusion that the statute does not refer to such existing common sewers. The power as expressed refers to property which "is drained or by any by-law is required to be drained." These words may apply to an existing as well as to a future state of things, and may include property drained or required to be drained at the time the act was passed, as well as that regarding which a by-law may be subsequently passed. And if the general funds, to which all ratepayers had contributed, had defrayed the cost of existing common sewers, those general funds would be reimbursed by the reasonable rent, and so the whole body of ratepayers would be proportionally benefited.

The objection taken to the first section of this by-law is not in our opinion tenable. It is true the word property is not used in the 18th sub-section, which gives power to compel draining, but it is used in the 20th sub-section, as to property which by any by-law is required to be drained into a common sewer. The word property as used in the 20th sub-section may perhaps include only the kinds of property enumerated at length in the 18th. If so, it may receive the same construction in the by-law, and if it be attempted to enforce the by-law as against any kind of property not specified in the 18th sub-section, the owner or occupier may raise the question that neither the statute nor the by-law touch him.

The general objection to the whole by-law is again taken to the third section. We confess we do not see what is the meaning of the objection which follows, that this section assumes to charge persons who own or occupy property required to be drained into sewers with a rent for the use of a thing which does not exist, and so cannot be used. This section speaks of property which is drained into any common sewer, or which is required to be drained into such sewer. It seems to us a perverse ingenuity to construe this expression to apply to a sewer *in posse* and not *in esse*, and if it is limited to the latter the objection disappears. And the last

objection to this section is founded on a misapplication of the language used in *Aldwell and The City of Toronto*, (7 C. P. 104.)

We have felt more doubt as to the fourth section, which permits the owner or occupier of any property so required to be drained to commute within one year for the payment of the annual rent. The case of *Moore v. Hynes*, (22 U. C. R. 107,) does not expressly decide the point, but it apparently recognises the existence of a right to pay off the annual rent by the payment of one commutation sum in gross.

The inclination of our mind is in favour of the legality of such an arrangement, and we therefore think we should disallow this exception also.

The objection to the fifth section should in our opinion prevail. In *Moore v. Hynes*, this court held that the sewer rent charged "is not a tax or charge upon the land," but upon the owner or occupier in respect of the land; and therefore it seems to follow that the summary remedy given by the statute for the collection of ordinary rates and assessments cannot be extended to these sewerage rents.

The sixth section is, in addition to objections which we do not think entitled to prevail, also impeached from the unreasonable requirement that all properties not already drained, which abut on any street or portion of a street in Toronto through which a common sewer has been constructed, and which are opposite to such common sewer, shall within fourteen days from the publication of this by-law by advertisement in any public newspaper in this city for one week be drained into such common sewer. The seventh section imposes a penalty on the owner or occupier of property who does not comply with section six of not more than \$10 nor less than \$1 for each month he shall omit to do so; and the eighth section provides for the enforcement of the penalty, to be recovered by distress and sale of the goods and chattels of the offender, or by imprisonment in case of non-payment, not exceeding thirty-one days.

In our opinion these provisions taken together are illegal, because the statute, though authorising the passing of a by-law to compel the drainage of the property specified,

couples it with a power to assess the owner with the cost thereof, if it be done by the council, on the owner's default—thus pointing out how the “compelling” is to be carried out; and because the payment of rent for the use of the common sewer is a personal charge, creating a debt; and it appears to us to be straining the powers conferred by the statute to hold that the corporation can virtually enforce payment of debts by compelling their creation under a by-law, by monthly penalties, which would or might soon exceed the limit of \$50, appointed by the Legislature. We do not think that the continued omission to do an act, which the council on such default are authorised to do, and to assess the owner for the cost thereof, authorises the infliction of a penalty or of imprisonment, which, by the way, cannot, according to the statute, exceed twenty-one days. If there can be a penalty for each month, *pari ratione* there can be an imprisonment also for non-payment of each penalty, a consequence sufficiently monstrous to prevent a construction of the statute which would give such powers. We think the provision compelling drainage within fourteen days an unreasonable requirement, not falling within a legitimate use of the powers conferred as to this special matter, but designed as the foundation for the two following sections, which we think illegal.

The objections to section 1 of by-law No. 304 rest, first, on the assumption that the whole by-law No. 295 will be quashed, but this fails, as the whole by-law is not quashed; secondly, on the assumption that section 3 of No. 295 will be quashed, which also fails.

As to section 2 of No. 304, we think it bad. As the penalties imposed by sections 7 and 8 of the by-law No. 295 are held illegal, and those sections are quashed, an alternative founded on the assumed liability to those penalties must fall through. The framer of this section appears to have overlooked the distinction between the authority of municipal councils and that of the Legislature, or he would scarcely have drawn up the proviso with which it concludes.

The result is, that so much of the rule as relates to quash-

ing the by-law No. 295 as a whole, or the first, third, and fourth sections thereof, must be discharged; and so much as relates to quashing the fifth, sixth, seventh, and eighth sections thereof, must be made absolute. And as to by-law No. 304, so much of the rule as relates to the first section is discharged, and so much as relates to the second section is made absolute.

Rule accordingly.

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### NATHAN SHELDON V. SMITH SHELDON.

*Agreement—Construction—Tenancy—Covenants and conditions—Ejectment—Notice to quit and demand of possession.*

Plaintiff and defendant being joint owners of certain land, the plaintiff assigned his interest to defendant, and defendant leased to the plaintiff for life at a nominal rent. On the same day, by articles of agreement between them under seal, which were to continue during the plaintiff's life, the plaintiff agreed to let defendant work the premises on condition that he should do so in a farmer-like manner, and deliver to him one-third of the proceeds, &c., which defendant covenanted to do; and each bound himself to the other in £1000 for the true performance of the agreement. Defendant went into possession, and the plaintiff had received some share of the crops according to the contract. On ejectment brought by the plaintiff,

*Held*, that defendant by his entry became a tenant from year to year on the terms of the agreement: that the plaintiff had a right to recover on breach of any of the conditions, notwithstanding there was a covenant also to perform them, and a penalty attached to the breach; and that no notice to quit or demand of possession were necessary.

THIS was an action of ejectment, brought by the plaintiff against the defendant to recover possession of the south half of lot number two, in the second concession of Windham, for the alleged breach of conditions in the agreement hereinafter set forth; and at *nisi prius*, by consent of the parties, and by order of *McLean*, C. J., before whom the case came on for trial at the last assizes at Simcoe, a special case was stated, in substance as follows:

On the 16th of April, 1857, the plaintiff and defendant were joint owners of the land in question, and on that day, by indenture, reciting, among other things, that the plaintiff gave an assignment of all his right, &c., to the premises, on condition that the defendant should give to the plaintiff a life lease of the premises; it was witnessed, "that in con-

sideration of the premises," and also of the rents, &c., "on the part and behalf of the party of the second part," (the plaintiff,) "to be paid, kept, and performed, hath granted, demised, and to farm letten," (not saying who granted, &c.,) to the plaintiff the premises in question, *habendum* to the plaintiff for life, paying yearly five shillings if demanded; the plaintiff covenanting to keep the premises in repair, and to pay all taxes, and defendant covenanting that the plaintiff paying the rent and performing the covenants should peacefully enjoy, &c.

On the same day, articles of agreement, under seal, were made between the plaintiff and defendant, by which the plaintiff agreed with defendant to let defendant work the same premises (except the small field and orchard which the plaintiff then occupied) on condition that defendant should work the premises in a farming-like manner, and deliver one-third of the proceeds thereof in the half bushel to the plaintiff, (except the wheat and oats, of which one-third was to be delivered in shocks, and one-third of the hay in cocks drawn in the barn.) The plaintiff also reserved half the pasturage; the defendant to have wood for fires and timber to keep the premises in repair off the land; neither party to sell wood or timber except when clearing land. The defendant covenanted with the plaintiff to work the premises to the best advantage in a farmer-like manner, and to deliver the proceeds as above in good season; and it was agreed that this agreement should continue during the plaintiff's natural life. Defendant also covenanted that should the plaintiff's present wife survive him, defendant would pay her \$50 a year during her life, and allow her to remain upon the premises and pasture a cow. And it was agreed that this agreement should vacate all bonds and agreements previously made between the parties for the payment of certain moneys; and for the true performance of this agreement each party bound himself to the other in the penal sum of £1000. There was a parol memorandum at the foot of this agreement, not material to the case.

It was admitted that the defendant went into possession of the premises in question at the time of the execution of

the above-recited instruments, and had thence hitherto continued in possession, and that the plaintiff had received some share of the crops in the said agreement covenanted to be given to him.

It was admitted that no notice to quit from the plaintiff to the defendant had been given, and no demand of possession from the plaintiff to defendant had been made. It was agreed that the notes of the learned judge who tried the case should be part of the case.

The question for the opinion of the court was, whether the plaintiff was entitled to recover possession of the premises in question from the defendant, without having given a notice to quit or made a demand of possession.

If the court should be of opinion in the affirmative, then it was agreed that the question of performance of the conditions contained in the above-recited articles of agreement should be referred to the award of D. W. Freeman, of the township of Windham, Esquire; and that if he should award that the conditions had been performed by the defendant, then judgment should be entered for the defendant, with costs of suit, but if the said arbitrator should award that the said conditions had been broken, then judgment for the plaintiff, with costs of suit, might be entered immediately.

If the court should be of opinion in the negative, then judgment with costs of suit should be entered for the defendant.

On the notes of the learned Chief Justice, which were to form part of the case, it was entered, that if the court should be of opinion that the plaintiff had a right to recover for default of proper cultivation, or breach of any other condition mentioned in the agreement, then the question was to be referred, &c.

*J. B. Read*, for the plaintiff, cited *Doe dem. Calvert v. Frowd*, 4 Bing. 557; *Doe dem. Henniker v. Watt*, 8 B. & C. 308.

*Anderson*, for the defendant.

DRAPER, C. J., delivered the judgment of the court.

The question is confusedly stated. If the plaintiff is not entitled to enter and eject the defendant by reason of a breach of the condition, then we do not understand that any question of notice to quit or demand of possession arises. But if a breach of condition does entitle the plaintiff to recover, then it is submitted that without such notice or demand the plaintiff cannot recover, and this question is also left to the court.

In *Simpson v. Titterall* (Cro. Eliz. 242) it is said, “‘*Proviso always*,’ implieth a condition, if there be not words subsequent, which may peradventure change it into a covenant; as where there is another penalty annexed to it for non-performance. But it is a rule in provisos, where the proviso is that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void; but if a penalty is annexed *aliter est*.” And this case is cited by *Bayley, J.*, in *Doe Henniker v. Watt*, (8 B & C. 316).

But it is, we think, very clear from that case, and the authorities cited in it, that if words of condition and words of covenant are used in the same instrument they both shall operate, and this is the case in the agreement before us, for the plaintiff agrees to let the defendant work the land upon the following conditions, setting them out, and the defendant covenants he will work the land as the foregoing conditions require. There are some covenants on the plaintiff's part, and other covenants on the defendant's part, not included in the conditions, and each party is bound to the other in a penalty for the true performance of the agreement. It appears to us therefore that the plaintiff has a right to recover on breach of any of the expressed conditions, notwithstanding that the defendant has covenanted to perform them, and that there is a penalty attached to the breach.

Then by the instrument itself the plaintiff agrees to let the defendant work a certain lot of land, upon condition that he shall work it in a farming-like manner, and deliver a certain share of the produce to the plaintiff, and it is agreed that this agreement shall continue during the natural life of the plaintiff. That the defendant is in possession is conceded by the fact that the plaintiff is bringing ejectment to turn him

out. If he is in possession under and by virtue of the instrument in question, then, if he has broken the condition, it is not denied the plaintiff has a right to recover. But it has been contended that this instrument does not operate as a lease, nor is defendant tenant under it, but that he is in possession with the assent of the plaintiff, cultivating the soil, and having delivered some share of the crops which he covenanted to deliver, and that by the acts and conduct of the two parties he has become tenant from year to year, or tenant at will, and therefore is entitled to a notice to quit or a demand of possession.

Treating this instrument as only an agreement for a lease on the terms therein expressed, or as an agreement that defendant might work the land, which involved his entry into and having possession of it, he must have become a tenant of some kind, and as appears to us a tenant from year to year. He then became tenant upon the terms of the agreement; and by delivering part of the crops, which was the only rent reserved, he in effect paid rent. He was tenant from year to year, but on certain stipulated conditions.

In *Thomas v. Packer*, (1 H. & N. 669,) the court held that a proviso in a lease for re-entry on non-payment of rent is a condition which attaches to the yearly tenancy created by the tenant holding over and paying rent after the expiration of the lease. The previous authorities are reviewed in that case, and *Tooker v. Smith*, (1 H. & N. 732,) only shews that the stipulations and conditions under which a tenant from year to year will be considered to hold, when he has entered under an agreement or a void lease, must not be such as are at open variance with the legal conditions and effect of a tenancy from year to year.

We think therefore that the defendant must be considered as holding under the conditions contained in the instrument secondly above set forth, and that for breach of those conditions he will be liable to be ejected without either notice to quit or demand of possession.

According to the terms of the case, it must be referred to the arbitrator named.

## KEENAHAN QUI TAM V. EGLESON.

*Conviction made in city—Return of—Pleading.*

The law as to the return of convictions is unchanged since the 4 & 5 Vict., ch. 12, and a conviction made by an alderman in a city must therefore still be returned to the next ensuing General Quarter Sessions of the Peace for the county, and not to the Recorder's Court for such city.

In an action for not making such return, *Held*, no objection in arrest of judgment, that the declaration shewed no law under which defendant could convict for the offence mentioned, or that it charged him with not making a return of the conviction and of the receipt and application of the moneys received under it, when if he had not received the money he would have only to return the conviction.

THE declaration stated that on, &c., one Belk laid an information before the defendant, then being a justice of the peace, and as such justice having authority, &c., that one Ellis had assaulted, &c., the said Belk: that defendant as such justice heard the said charge, Ellis being before him, and that, after hearing the same, defendant as such justice convicted Ellis of the offence charged, and adjudged him to pay a fine of 10s., to be distributed according to law, and to pay 18s. 9d. to Belk for his costs, and in default to be imprisoned: that it was defendant's duty to make a return of such conviction to the ensuing General Quarter Sessions of the Peace for the county of Carleton, within which such conviction took place, and of the receipt and application by him of the moneys received by him from Ellis, by virtue of such conviction, yet defendant, not regarding the statute, did not make a return in writing under his hand of the said conviction, and of the receipt and application by him of the moneys received by him from Ellis, to the next ensuing General Quarter Sessions of the Peace of the county of Carleton, although a reasonable time had elapsed after the conviction took place, and before the said General Quarter Sessions, and although a General Quarter Sessions of the Peace for the said county had been held after the said conviction, and within six months next before the commencement of this suit, whereby an action hath accrued, &c.

*Plea*, not guilty.

The trial took place at Ottawa, in May last, before *Draper*, C. J.

It appeared that the assault complained of took place

within the city of Ottawa, of which city defendant was an alderman: that the defendant in June, 1862, (on the 12th or 13th,) convicted Ellis of an assault, as stated in the declaration: that the fine and costs were paid to the gaoler, as Ellis was committed, and that no return of this conviction was made by defendant to the court of Quarter Sessions, held in September, 1862, in and for the county of Carleton, within which the city of Ottawa is situate, nor since. It further appeared that defendant did return the conviction on the 17th of January, 1863, to the Recorder's Court of the city of Ottawa, after this action was commenced. But there had been a session of the Recorder's Court in July, in September, and in December, 1862.

It was objected that the defendant was an alderman of the city of Ottawa, and therefore *ex officio* a justice of the peace: that the offence and the conviction both took place within the city of Ottawa, and that the return was therefore not required by law to be made to the General Quarter Sessions of the county of Carleton. The objection was overruled, but leave was reserved to move to enter a nonsuit, and the plaintiff had a verdict for the penalty, £20.

In Easter Term *C. S. Patterson* obtained a rule *nisi* for a nonsuit on the leave reserved, or to arrest the judgment, on the ground that the facts alleged in the declaration did not render defendant liable to the penalty. The objections were that it did not shew under what law defendant could convict for assault, nor that the justice was requested to try the matter of the complaint (*a*): that there might by law be two returns, one of the conviction, the other of the receipt and appropriation of the fine, &c.: that if he did not receive the money he had only one return to make, but the declaration charged that he did not return the conviction and the receipt, &c.

In this term *Spencer* shewed cause.

DRAPER, C. J., delivered the judgment of the court.

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(*a*) See in the Matter of Appeal between Switzer and McKee, 9 U. C. L. J., 266.

The duty for non-performance of which the defendant is sued was imposed by the statute 4 & 5 Vict., ch. 12, which is re-enacted and confirmed by the Consol. Stats. U. C., ch. 124. The first section requires every justice of the peace before whom any trial is had under any law giving jurisdiction in the premises, and who convicts and imposes any fine, &c., on the defendant, to make a return thereof in writing under his hand, "to the next ensuing General Quarter Sessions of the Peace for the county in which such conviction takes place, and of the receipt and application by him of the moneys received from the defendant."

When the statute 4 & 5 Victoria was passed there was no recorder's court in existence, and the Legislature evidently meant then that all these returns should be made to the next General Quarter Sessions of the Peace for the county. There were recorder's courts erected and provided for when the Consolidated Statutes were passed, but the language of this act remains unchanged.

The 362nd section of the Municipal Act (Consol. Stats. U. C., ch. 54) makes the aldermen of a city *ex officio* justices of the peace for the whole county in which the city lies, and requires no property qualification, while justices of the peace appointed by the Queen under the great seal for the county must have a property qualification, and have no jurisdiction over offences committed in a city within that county. The recorder's court as to crimes and offences committed in the city has the same *jurisdiction* and *powers* as courts of Quarter Sessions of the Peace in counties, (sec. 370,) and the city clerk, or such other person as the council of the city may appoint, shall also be clerk of the recorder's court, and perform the same duties as clerks of the peace (sec. 376). The words "Quarter Sessions" are by the last section of ch. 114 of the Consol. Stats. U. C. declared to include recorder's courts, but that statute has no reference to the present contention.

We are of opinion that no change has been made by the later enactments in the operation of the statute requiring justices of the peace to make returns of convictions, and therefore that the plaintiff ought not to be nonsuited. When

he shewed that there had been a conviction by defendant as a justice of the peace in June, 1862, and that no return had been made thereof to the General Quarter Sessions, he proved his case.

We are also of opinion that there is no ground to arrest the judgment. We do not perceive that the declaration need do more than is done in this case. O'Reilly *qui tam* v. Allan (11 U. C. R. 411) shows that the illegality of a conviction constitutes no defence to an action like the present. The justice should return the conviction, and so, according to the case of Rex v. Eaton, (2 T. R. 285,) he ought in all cases to do in England. It does not lie in his mouth to say he had no jurisdiction, when he has actually convicted and imposed a fine. As against him the conviction affords evidence that he claimed and exercised jurisdiction to convict and impose a fine, and having done so, it became his duty to make a return. Kelly *qui tam* v. Cowan, (18 U. C. R. 104,) shews the return of the conviction to be proper, though the fine has not been paid; and Murphy *qui tam* v. Harvey, (9 C. P. 528,) affords no aid to the argument of the defendant's counsel. The penalty is, we think, incurred by not returning the conviction, even though the return of the receipt of the money could not be made, as where the party convicted was committed on default of payment, or where the payment was for some reason delayed until after the next General Quarter Sessions following the conviction.

Rule absolute.

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# A DIGEST

OF

## ALL THE REPORTED CASES

DECIDED IN

# THE COURT OF QUEEN'S BENCH,

FROM EASTER TERM, 25 VICTORIA, TO  
TRINITY TERM, 27 VICTORIA.

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### ABSCONDING DEBTOR.

*See* DIVISION COURTS.

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### ACCORD AND SATISFACTION.

*See* ATTORNEY, 1.—COVENANT.

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### ACTION.

*See* ATTORNEY.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 3.—GARNISHMENT, 2.—GOODS SOLD AND DELIVERED.—INTERPLEADER, 2.—LANDLORD AND TENANT.—LEASE.—MORTGAGE.—PARTNERS AND PARTNERSHIP.—POSSESSION.

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### ADMISSIONS.

*See* SEDUCTION.

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### ADVERTISEMENT.

*See* TAXES, 8.

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### AGENT.

*Evidence of Agency.*—*See* PRINCIPAL AND AGENT.

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### AGREEMENT.

*See* CONTRACT.

### ALIENATION.

*See* WILL, 2.

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### AMENDMENT.

The plaintiff sued on an agreement by defendant to store with him all defendant's wheat during the season, alleging as the consideration that the plaintiff would store it, and would rent another storehouse, and claiming damages for the expense of such renting. At the trial the plaintiff's witnesses failed to prove that part relating to the storehouse, and the declaration was amended by striking it out. The plaintiff was then called for the defence, and stated the agreement as at first set out. His counsel did not amend again, and the jury found for the plaintiff, adding that they believed the storehouse to be in the contract. The court in term allowed the declaration to be restored to its original form, and refused a new trial. *Petrie v. Tan-nahill*, 608.

*Should not be allowed if it makes the pleading demurrable.*—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

*Allowed on demurrer, on payment of 5s. costs.*—*See* PLEADING.

*See* ATTORNEY, 3.

## AMERICAN CURRENCY.

*Lease by American and Canadian Companies—Right to pay rent in.*—  
See CONTRACT, 2.

## APPEAL.

*Appeal from the Recorder's court—Practice.*—Defendant was convicted at the recorder's court of obstructing a highway, on contradictory evidence, the result of the verdict being to shew that he and several others, whose houses and enclosures had been standing for sixty years, were encroaching upon the street. A new trial having been refused, on appeal only the evidence was returned to this court with a copy of the rule *nisi*. The court under these circumstances, considering the importance of the case, and that the grounds of the judgment below were not given to them, directed a new trial, contrary to the usual rule, which was affirmed, that such appeals will not be entertained upon questions of evidence. *Regina v. McLean*, 443.

*Leave to appeal refused.*—See DEFAMATION, 3.

## ARBITRATION AND AWARD.

1. *Uncertainty—Motion to set aside.*—A dispute arose between the Northern R. W. Co. and the corporation of the town of Barrie, as to the construction of a branch line into the town, and it was agreed by both parties that a bill relating thereto, which was before the House of Parliament then in session, should be withdrawn, and all differences connected with the claim of the town against the company be referred to the arbitration of one H. The arbitrator awarded that there was in 1853 a valid agreement by the company with the town to construct

this line, provided that suitable land should be procured by the town: that such land was so procured, but that the line had not been constructed: that the claim of the town to have such agreement performed still subsisted, "and if not performed their right to compensation in lieu thereof ought to be awarded." He then awarded as compensation for the non-performance of the said agreement, and in full satisfaction of the said claim, that the company should pay to the corporation at a day and place named £5000, and that they should, when requested by the town, execute to them a conveyance in fee of all the lands mentioned in a certain indenture made by one B. to the company; and should further, when so requested, execute a general release of all claims in respect of the land and right of way conveyed to them by the several parties over whose lands the said branch line was to pass. On motion to set aside this award for defects only apparent on the face, *Held*, that it was not defective for uncertainty as to whether the agreement had been carried out, and whether the company had an option to pay the £5000 or construct the branch line, but sufficiently showed that it had not been performed, and that no such option was intended: that the directions as to the conveyance and general release were authorised, and the latter not objectionable for omitting to state to whom it was to be made; and that as to the amount awarded, if, as contended, the corporation could claim no damages beyond what they had expended in procuring the land, &c., it should be assumed no more was given. *Held*, also, that the inability of the company under their charter to expend

their funds in paying the award would be no ground for setting it aside. *In the matter of the arbitration between the Corporation of the town of Barrie and The Northern Railway Company of Canada*, 25.

2. *Action on bond of submission—Objections to award—Finality—Certainty—Pleading.*—The plaintiffs declared on a bond given by two defendants for the performance of an award to be made in pursuance of an agreement to refer. This agreement, as set out, was between the defendant M. and the plaintiffs, reciting that certain differences had arisen between them as to the damages sustained from the non-performance by either of the conditions contained in a lease of a certain farm; and also as to the damages which the plaintiffs, or either of them, were entitled to recover from M. for the surrender of said lease, if the arbitrators should determine that no forfeiture of it had occurred; and also respecting the damages which S., one of the plaintiffs, was entitled to recover from M. for wrongfully causing a warrant to be issued, and arresting him on a charge of stealing: that another dispute had arisen as to the right to the possession of certain goods, for which an action of replevin was then pending by M. against the plaintiffs, and the damages which they, or either of them, had sustained by reason of such replevin: that another dispute had arisen as to the right to possession of certain other goods then on the said farm, and that a suit had been brought by the plaintiffs in the name of S. against M. in the division court—and by the agreement these and all other matters in difference between the parties were referred to two

arbitrators named, and such third person as they should appoint before proceeding with the reference.

The declaration then alleged that the arbitrators, as to the first cause of dispute, awarded that neither M. nor either of the plaintiffs had sustained damage from the non-performance of the lease: that no forfeiture had occurred: and that for the surrender of it by the plaintiffs to M. the plaintiff S. was entitled to receive from M. \$200, to be paid forthwith; but that as H., the other plaintiff, had already received a sum therefor, he was entitled to nothing further. As to the second matter referred, they awarded \$50 to be paid forthwith by M. to S. As to the third subject of reference, that M. was not entitled to possession of the goods, and they awarded to the plaintiff 1s. for his damages by reason of the replevin. As to the fourth dispute, that M. should pay S. \$110 forthwith, for the share of S. in the produce of the said land, and in the goods demised by the lease; and lastly, that S. was not entitled to recover in the division court suit, nor to receive anything further from M.: that M. was entitled to nothing from S.; and that H. was entitled to nothing from M., nor M. from him. The breaches assigned were non-payment of the several sums awarded to S.

*Held*, on demurrer, on various grounds, that the declaration and award were good: that the other defendant was liable for the non-payment of the \$50, though it was a matter in difference between the plaintiff S. only and M.; and that the replevin suit, and the right to the possession of the goods in question therein, and of the other goods, were clearly and finally disposed of.

The defendants also pleaded,

setting out the whole award as stated in the declaration, and alleging that it was void on the face of it, for not deciding all the matters referred, for want of finality, and for excess of authority. *Held*, on demurrer, plea bad, as putting in issue matter of law already brought up by the demurrer. *Stinson et al. v. Martin et al.*, 154.

3. *Reference—Subsequent proceeding in the suit.*]—Where a cause and all matters in difference had been referred, and an award made, *Held*, that all questions of law as well as fact were thereby submitted to the arbitrators: that a demurrer afterwards set down for argument must therefore be struck out of the paper; and that objections to the award as bad upon its face could not be raised as giving a right thus to proceed with the action.

*McCollum v. McKinnon*, 175.

### ARREST.

See CRIMINAL LAW, 2.

### ASSAULT.

*Right to convict of, under indictment for manslaughter.*]—See CRIMINAL LAW, 1.

### ASSESSMENT.

See TAXES.

### ASSIGNMENT (FOR BENEFIT OF CREDITORS).

See MONEY HAD AND RECEIVED.

### ASSIGNMENT.

*Of warehouse receipts—Effect of.*]—See WAREHOUSE RECEIPTS.

### ASSIGNEE OF REVERSION.

*Right of to sue for rent.*]—See LANDLORD AND TENANT, 1, 2.

### ASSURANCE.

See INSURANCE.

### ATTACHMENT.

*Of debts.*]—See GARNISHMENT.

*Against absconding debtor.*]—See DIVISION COURTS.

### ATTORNEY.

1. *Action for negligence—Pleading—Accord and satisfaction.*]—The declaration charged that the plaintiff had retained defendants as attorneys to prepare a deed of certain lands from him to one D., and a mortgage back to the plaintiff for £750, the balance of the purchase money, and to cause the mortgage to be duly registered within a reasonable time: that the defendants accepted such retainer, and promised to do the work, but neglected to register the mortgage for ten months, and until D. had executed a subsequent mortgage to other persons, which was recorded before that to the plaintiff. Defendants pleaded, 2. That the registrar was by law entitled to certain fees before recording any deed, as the plaintiff well knew: that he never furnished them with any money to pay the same; “and so the defendants say that the said mortgage was not registered by the registrar or by the defendants for the default of the plaintiff in not providing the defendants or said registrar with any sum of money to pay the said registrar the fees allowed to him by law for registering the said mortgage.” 3. That after breach the plaintiff accepted from D. another mortgage on other land of D., as security to the plaintiff for £750, in full satisfaction and discharge of defendants’ promise and all damages accrued to the plaintiff from

the breach thereof. *Held*, on demurrer, third plea good, it being no objection that the accord was by a third person, a stranger to the action. *Per McLean, C. J.*—The second plea was bad, for the retainer being admitted, the plaintiff's omission to furnish money formed no excuse, without notice to him that it was required, which defendants should have averred. *Per Hagarty, J.*—The plea stated that the non-registration was caused by the plaintiff's neglect to furnish fees which he knew were necessary, and it therefore could not be held bad. *Burns, J.*, being absent, and the court thus equally divided, no judgment was given on the demurrer to the second plea. *Lynch et al., Administrators of Connell James Baldwin, v. Wilson et al.*, 226.

2. *Duty under common retainer—Neglect to re-register judgment.*—*Held*, that under the ordinary retainer to collect a debt, an attorney was not bound to re-register the judgment, which had been obtained by him, and put on record; and that the evidence in this case shewed no special retainer for that purpose. *Semble*, that the common retainer imposes no duty to pursue any collateral remedies, such as to register the judgment in the first instance, or to examine the defendant, or to attach debts due to him. *Darling et al. v. Weller*, 363.

3. *Attorney and Barrister—Liability when acting as both.*—The plaintiff declared in contract against an attorney, for negligence in conducting a suit for him against one P., alleging the breaches of promise to be, that although P. pleaded a set-off on a promissory note, yet defendant improperly denied the making of such note, whereas the plaintiff

had paid it; and also, that although defendant had notice of this a reasonable time before the trial, and that the payment could be proved by two witnesses named, yet he neglected to subpoena them, and took the case to trial without instructions; and also, that defendant did not instruct counsel to act for the plaintiff at the trial, and inform him of the facts above mentioned, but acted as counsel himself, and neither applied for an amendment of the replication, nor suggested to the court that he could prove payment of the note, which he could have done, as the said witnesses were then there attending to other duties—wherefore the set-off was allowed. Defendant pleaded, as to so much of the declaration as alleged that he did not instruct counsel, but acted as such himself, that he was a barrister in Upper Canada, and that the plaintiff never objected to his so acting; and he demurred to so much as alleged that he did not while so acting apply to amend, or offer to prove payment, on the ground that for his conduct as counsel no action would lie. Plaintiff demurred to the plea as no answer. *Held*, (affirming the judgment of the county court,) that the plaintiff was entitled to judgment, for the defendant by acting as counsel himself could not escape liability for neglecting as an attorney to give proper instructions.

*Quere, per Adam Wilson, J.*, whether, considering the union of the professions in this province, and the right of counsel in some cases to recover fees, the same exemption from liability can be claimed here as in England, even when the same person does not act in both capacities. *Leslie v. Ball*, 512.

*See COUNTY ATTORNEY.*

## AUDIT

*Of accounts of Clerk of the Peace.*]  
—See CLERK OF THE PEACE.

*Of sheriff's accounts.*—See SHERIFF.

## BAILIFF.

See DIVISION COURT BAILIFF.

## BANKERS.

*Money advanced to corporation for purposes beyond their charter. Right to recover.*—See CORPORATIONS.

## BARN.

*Sued for as a chattel.*—See GOODS SOLD AND DELIVERED.

## BARRISTER.

*Liability of when attorney in the suit.*—See ATTORNEY, 3.

*Barristers called*—72, 165, 282, 377, 472.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Mortgage given for notes—Fraud—Right to sue on the notes.*—The defendant being indebted to the plaintiff on bills and notes, executed to him a mortgage for the amount, which the plaintiff accepted on defendant's representation that it was a first claim on the land. On going to the registry office at once, the plaintiff's attorney found a prior encumbrance, and immediately went to defendant and told him the plaintiff would not accept the mortgage. *Held*, that the plaintiff could not thereupon sue on the original cause of action, but should at least have tendered a reconveyance. *Adams v. Nelson*, 199.

2. *Promissory note—Pleading.*—To a declaration by payee against the maker of a promissory note,

defendant pleaded that he made and the plaintiff received the note from him, and thence hitherto held the same, on certain terms and for a special purpose only, to wit, that the plaintiff should take care of it for him, and should not negotiate or part with it to any other person, and that there never was any value or consideration for the note except as aforesaid. *Held*, on demurrer, a good defence. *Asa Wismer v. David Wismer, the younger, Executor of David Wismer, the elder*, 446.

3. *Bill of exchange—Right to sue upon—Amendment disallowed.*—The plaintiffs declared against the acceptor on a bill as drawn in their favour, but which, when produced, was found to be payable "to the order of Thomas G. Ridout, Esq., cashier." It was endorsed. "Pay John Smart, Esq., cashier, or order. Thomas G. Ridout, cashier," but the name of Thomas G. Ridout had been struck out. At the trial the plaintiffs were allowed to amend by alleging that the bill was payable to the order of Ridout, who endorsed to Smart, and that they being the plaintiffs' agents and cashiers received the bill for them, and as their property. *Held*, 1. That the plaintiffs could not recover, for the beneficial interest which they were alleged to have in the bill would not entitle them to sue on it in their own name. 2. That the amendment should not have been allowed, as the effect of it was to make the declaration demurrable, and bad in arrest of judgment. *The Bank of Upper Canada v. Ruttan*, 459.

4. *Promissory note—Set-off—Consol. Stats. U.C., ch. 42.*—In an action against the maker and endorser of a promissory note, *Held*, that neither defendant could plead separately a

set-off not arising out of or connected with the note. *Hughes et al. v. George William Snure and Jacob Snure*, 597.

See MONEY HAD AND RECEIVED.

### BOND.

1. *Bond to account and pay over on demand—Construction of—Sufficiency of demand on one of three executors.*—The defendant bound himself that one G. C., his executors or administrators, at the expiration of his office as treasurer, upon request to him or them made should give to the plaintiffs a just account of all such moneys as should come into his hands, and should pay and deliver over to his successor in office, or any other person duly authorised to receive the same, all balances due by him to the plaintiffs. One of the breaches assigned in an action on this bond was, that although a large sum was due at the expiration of his office, and a successor duly appointed, and although duly requested so to do, yet neither G. C., nor his executors or administrators, had paid the same. To this the defendant pleaded that the plaintiffs did not request G. C., or his executors, or either or any of them, to pay. *Held*, a good defence, for the words in the condition, "upon request to him or them made," applied both to the giving an account and to the paying over.

At the trial it appeared that defendant was one of three executors of G. C.; but that he did not act in the affairs of the estate, and lived at some distance; and that a request to pay over all moneys, &c., had been made upon the other two executors, but not on him. It was admitted, however, that all the executors had been sued on this bond, and served with

process and declaration before the commencement of this action. *Held*, that the demand was sufficient.

*Per Hagarty, J.* *Quere*, whether, as a general rule, when a demand upon executors is necessary it must be made upon all. *Semble*, not in order to support an action on a contract of the testator, but that a demand upon one would be insufficient to cast any new or personal liability on another executor.

A bond to "The Provisional Municipal County Council of the County of Bruce," "The Provisional Corporation of the County of Bruce," being the proper corporate name, *Held*, sufficient. *The Provisional Corporation of the County of Bruce v. Robert Cromar*, 321.

2. *Bond to deliver goods seized—Demand—Pleading—Judgment non obstante.*—In an action against one of two obligors on a joint and several bond reciting that the plaintiff, as sheriff, had seized certain goods under a *fi. fa.* at the suit of G. against C., the other obligor, and S., and conditioned to be void if the obligors should deliver the same to the sheriff, or any person duly authorised, at such time and place as he should appoint, to be sold under said writ or any other writ which the sheriff might then have: *Held* not necessary to shew a demand on both obligors.

The second plea was, that at the time pointed out for delivery the sheriff had no writ at the suit of G. under which he could have sold said goods. At the trial the only writ produced was one tested the 21st of May, 1859, and spent. Issue having been taken, and a verdict rendered for defendant on this plea, *Held*, that there must be judgment *non obstante*; for as the bond expressly admitted a

levy under this writ, defendant could not object to the plaintiff's right to sell, and the plea therefore formed no defence. *Fortune v. Cockburn*, 359.

### BOUNDARY.

*Right to try in actions of ejectment.*]—See EJECTMENT, 1.

### BURDEN OF PROOF.

*In an action on covenant for title.*]—See COVENANT FOR TITLE.

### BY-LAW.

See ROADS.—SEWERS.

### CARRIER.

*Owner of vessel sunk by collision may recover the value of goods in his custody as carrier.*]—See COLLISION.

### CERTIFICATE.

*Of discharge of mortgage—Effect of.*]—See LANDLORD AND TENANT, 1.

### CHARACTER.

*Evidence of, rejected in slander.*]—See DEFAMATION, 3.

### CHATTEL MORTGAGE.

Where an agreement was entered into for advances to be made in sums and at times specified, and a mortgage taken to secure their repayment, *Held*, (affirming the judgment below,) that a departure from the agreement in the times and manner of such advances could not alone defeat the mortgage, though it might be urged to the jury as against the *bona fides* of the transaction. *Strange v. Dillon*, 223.

### CLERK OF THE PEACE.

1. *Fees—Audit of his accounts.*]—It is the duty of the magistrates in quarter sessions, not of the county auditors, to audit the accounts of the clerk of the peace before payment, and the treasurer should pay them upon the production of the chairman's order.

It was decided in *The Corporation of Lambton v. Poussett*, 21 U. C. R. 472, that the clerk of the peace is not to look to the government for the expenses payable by them under Consol. Stats. U. C., ch. 120, but to the county, who are to be reimbursed by the government.

Where the clerk applied to the county auditors instead of to the sessions, and they refused on the ground that he should be paid by the government in the first instance, both parties being wrong, the court discharged without costs a rule for a mandamus calling upon the county to pay. *In the Matter of Poussett, Clerk of the Peace, and the Corporation of the County of Lambton*, 80.

2. *Fees.*]—The clerk of the peace under Consol. Stats. U. C., ch 124, and the tariff of 1862, No. 57, is entitled only to one dollar for each quarterly return of convictions made by him to the Minister of Finance, not to one dollar for the list of convictions sent to him by each justice included in such return.

The drafting the panel from the jury list, under the Jurors' Act, Consol. Stats. U. C., ch. 31, sec. 78, is not a special sessions of the peace, and the clerk therefore is not entitled to charge for it under No. 66 of the tariff.

The clerk is required, by Consol. Stats. U. C., chaps. 19, 120, to record and notify to the gov-

ernment and to the clerks of each division court only the acts of the *Quarter Sessions* with regard to the limits of the different divisions, not the orders of the judge as to the times and places of holding the courts; and he is not entitled therefore, under the tariff, Nos. 38 to 43 inclusive, to charge for such last-mentioned orders. *In the Matter of Poussett, Clerk of the Peace, and the Court of General Quarter Sessions for the County of Lambton*, 412.

*Is ex officio County Attorney.*]—  
See COUNTY ATTORNEY.

See DEFAMATION, 2.—JURY, 1.

### COLLECTOR.

See TAXES, 2.

### COLLISION.

*Both vessels carrying wrong lights —Right to recover for cargo.*]—In a case of collision, it appeared that both vessels were carrying the lights prescribed by the 14 & 15 Vict., ch. 126, although that act had been repealed three years before by the 22 Vict., ch. 19, which required other lights in different places. *Held*, that as the error was common, and neither therefore could have been misled by it, the case must be treated as if both were carrying the proper lights.

*Held*, also, that the owner of the vessel not in fault might recover the value of goods on board not owned by him, but in his custody as a carrier. *Irving v. Hagerman et al.*, 545.

### COMMON COUNTS.

See INTEREST.—MORTGAGE.

### COMMON SCHOOLS.

See TAXES, 5.

## COMMON LAW PROCEDURE ACT.

See GARNISHMENT.—STOCK, 1.

### COMMUTATION.

See TAXES, 3.—SEWERS.

### CONFLICT OF LAW.

See CONTRACT, 2.

### CONFLICT OF OPINION.

*Between the courts, practice as to granting new trial.*]—See EJECTMENT, 1.

### CONDITIONS.

See INSURANCE.—LANDLORD AND TENANT, 4.

*Conditional subscription of stock.*]—  
See STOCK, 2.

*In will against alienation.*]—  
See WILL, 2.

### CONSIDERATION.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—COVENANT, 1.

### CONSTABLE.

*Conviction of for negligent escape.*]—  
See CRIMINAL LAW, 2.

### CONTRACT.

1. *Agreement — Construction.*]—  
Plaintiff undertook to build for defendants all the bridges on a portion of the Grand Trunk Railway, and furnish the iron, "same to be shipped on board steamships from Great Britain to Montreal, the defendants paying the difference between freight and insurance by steamships and first-class sailing ships." *Held*, that they were bound to pay

such difference on all shipments, not merely on those made at a time when sailing vessels could be procured. *Coulson v. Gzowski et al.*, 33.

2. *Lease by American and Canadian companies—Right to pay rent in American currency.*—The plaintiffs, two corporations, declared on defendants' covenant to pay them \$22,500 for six months' rent, due on the 1st of June, 1863. Defendants pleaded that the premises were partly in the United States: that the plaintiffs had their place of business in the States, and that on the 1st of June defendants tendered to them there \$22,500 in lawful currency of the United States, which they refused; and the defendants brought into court \$15,525 of lawful money of Canada, which they averred was on said 1st of June, and is equal in value to the said \$22,500 of the lawful currency of the United States. The plaintiffs replied that the deed was executed in Canada: that one of the plaintiffs was a company incorporated and having its domicile here, and the other in the United States: that the rent reserved was payable in current money of this province; and that at the execution of the deed and hitherto the said \$22,500 was and had always been equal to \$22,500, and not at any time to \$15,525 of current money of the province; and that the tender made of the equivalent in American currency of the last-mentioned sum was not valid. On demurrer to the replication, *Held*, that the contract being made in Canada, and mentioning no place where the payments were to be made, must be governed by our law: that the rent must be intended from the declaration to be payable in current money of Canada: that there was nothing in

the plea to displace this intendment; and that the plaintiffs therefore were entitled to judgment. *The Niagara Falls International Bridge Company and the Niagara Falls Suspension Bridge Company v. The Great Western Railway Company*, 592.

*Bond to account and pay over on demand — Construction of.*—See BOND, 1.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1. — CORPORATIONS. — COVENANT. — DOWER. — GOODS SOLD AND DELIVERED. — LANDLORD AND TENANT, 4. — LEASE.

## CONVEYANCE.

*Power of arbitrator to award.*—See ARBITRATION AND AWARD, 1. — DOWER.

## CONVICTIONS.

*Conviction made in city—Return of—Pleading.*—The law as to the return of convictions is unchanged since the 4 & 5 Vict., ch. 12, and a conviction made by an alderman in a city must therefore still be returned to the next ensuing General Quarter Sessions of the peace for the county, and not to the Recorder's Court for such city.

*Held*, in an action for not returning such conviction, no objection in arrest of judgment that the declaration shewed no law under which defendant could convict for the offence mentioned, or that it charged him with not making a return of the conviction and of the receipt and application of the moneys received under it, when if he had not received the money he would have only to return the conviction. *Keenahan qui tam v. Egleson*, 626.

*Fees to clerk of the peace for quarterly return of convictions to Minister of Finance.*—See CLERK OF THE PEACE, 2.

See CRIMINAL LAW, 1, 2.—TOLLS.

### CORPORATIONS.

*Great Western R. W. Co.—Loan to Detroit and Milwaukee R. W. Co.—Money advanced by bankers for purposes beyond defendants' charter—Right to recover for overdrawn account—Evidence—Res gestæ.*—The Great Western Railway shareholders resolved in 1857 to advance £150,000 sterling to the Detroit and Milwaukee Railway Company, and again, in 1858, a further sum of £100,000 sterling. The first loan was expressly sanctioned by Parliament, and they also had parliamentary authority to use their funds "by way of loan or otherwise, in providing proper connections, and in promoting their traffic with railways in the United States." These two loans were to be expended by the managing and financial directors of the lenders. The latter applied to the plaintiffs, then being the bankers of the Great Western Railway Company, to advance money under these resolutions; all traffic receipts of the Detroit and Milwaukee Company to be deposited with the plaintiffs, and exchange on the Great Western Railway's London Board to be given monthly to cover any deficiency. The account was opened by the plaintiffs as "Detroit and Milwaukee Railway account, Great Western Railway," and kept distinct from the Great Western Railway account proper. Large advances were made, and exchange drawn; the business was carried on for two years, and moneys advanced by the G. W. R. to the

D. & M. Co., beyond the amount of the two loans, the result being a large balance in favour of the plaintiffs. It was proved that of the two loans only about \$700,000 was paid to the plaintiffs by exchange or traffic receipts. Difficulties arose, defendants insisting that credit was not given to them, but either to the D. & M. Co. or to the individual directors negotiating the arrangement; and the plaintiffs sued for the balance overdrawn, amounting to about \$1,000,000. At the trial many objections were taken:—that credit was not given to defendants: that they could not be bound except under seal; and that all advances to the foreign company were *ultra vires*, as the plaintiffs well knew. Leave was reserved to move for a nonsuit, and it was left to the jury to say (among other things) to whom credit was given, who reaped the benefit of the expenditure of this money, and whether the plaintiffs had any notice of the loans being exceeded. The jury found all these points in favour of the plaintiffs.

*Held*, that the plaintiffs as bankers could under the special circumstances recover, although there was no evidence of a debt under seal; that the objection of the advances being *ultra vires* could not prevail under the peculiar facts of the case: that it was a question of fact for the jury whose credit was actually pledged and to whom credit was given; and that there was evidence to support the finding for the plaintiffs.

*Held*, also, that it was sufficient to ask the jury whether the plaintiffs gave credit to defendants or to the D. & M. Co., without asking whether such credit was also accepted, for this with all the circumstances of the arrangement was included in the question.

The question whether defendants had "reaped the benefit" of the advances made by the plaintiffs was objected to as too vague, as they might have done this indirectly, by the increase of traffic on the D. & M. line, &c., without creating any legal liability; but *held*, unobjectionable.

B. & R. (defendants' managing and financial directors) wrote to the plaintiffs, asking for a credit of \$100,000 on their D. & M. account, which was considered on the 1st of April, 1858, at the plaintiffs' board, and was accepted by letter of their cashier on the same day. *Held*, that the minutes of the board were admissible for the plaintiffs, as part of the *res gestæ*.

*Held*, also, that a bank statement sent by the plaintiffs' agent at Hamilton to their head office, shewing how the account was kept, was properly admitted.

When it was proposed to open the account the plaintiffs' cashier met R., defendants' financial director, in Toronto, to discuss the matter, and made an arrangement, which it appeared R. was aware the cashier had to report to his board for approval, and which he told R. he had no doubt would be carried out. *Held*, that the cashier's verbal report to the plaintiffs' board on his return, two days after, was admissible as part of the *res gestæ*, as a declaration accompanying an act.

Defendants' secretary, called by the plaintiffs, produced copies of the proceedings of defendants' London Board, which he said had been sent by them to the board here as such copies, but which he could not prove otherwise to be so. *Held*, clearly sufficient.

A book containing a report of certain charges made by defendants'

shareholders against the directors, and the reply of the latter, which had been sent out by the English to the Canadian Board, and circulated by the latter here, *Held*, also admissible, though of little importance to the case. *The Commercial Bank of Canada v. The Great Western Railway Company*, 233.

*The inability of a railway company, parties to a submission, to expend their funds in paying the award, Held, no ground for setting the award aside.*]—See ARBITRATION AND AWARD, 1.

*Lease by American and Canadian companies—Right to pay rent in American currency.*]—See CONTRACT, 2.

*Misnomer of municipal corporation in bond.*]—See BOND, 2.

See MUNICIPAL CORPORATIONS.

## COSTS.

*Rule for costs for not proceeding to trial—Rule of court, No. 120—Practice.*]—In ejectment against U. and H., after notice of trial given a summons was obtained to allow U. to defend as landlord in lieu of H., and an order to that effect was made on the commission day of the assizes, 13th of April. The plaintiff, in consequence, did not enter his record, and on the 27th, during the assizes, defendant's attorney (who had made no amendment as allowed by his order) took out a rule for costs of the day on the ordinary affidavit, that the plaintiff had not proceeded to trial pursuant to notice nor countermanded it. *Held*, that such rule must be set aside with costs, for the plaintiff under the circumstances was not bound to go to trial in pursuance of his notice. Per *McLean*, C. J.—

Such rule was irregular, for as the judge at *nisi prius* might have allowed the record to be entered at any time during the assizes, there could be no default until they were over. *Per McLean, C. J., and Wilson, J.,* under rule of court No. 120, such rule may issue in vacation, at any time after the assizes for which notice was given. *Per Hagarty, J.,* *semble*, that the rule of court was not intended to allow such a rule to be obtained sooner than by the previous practice, but to give it either in the term following the assizes or in any subsequent vacation. *Adshead v. Upton and Holborn*, 429.

See CLERK OF THE PEACE.—PLEADING.

#### COUNSEL.

*Liability of.*]—See ATTORNEY, 3.

#### COUNTY ATTORNEY.

*Clerk of the peace—County attorney—Consol. Stats. U. C., ch. 106, sec. 7.*—In 1858 the plaintiff was appointed county attorney for Wentworth. In May, 1862, the person who had for many years been clerk of the peace for that county died, and in August following defendant was appointed to succeed him in such office. *Consol. Stats. U. C., ch. 106, sec. 7,* enacts that any clerk of the peace appointed after that act “shall be *ex officio* county attorney for the county of which he is clerk of the peace.” *Held*, that defendant upon his appointment as clerk of the peace became also county attorney, although the plaintiff’s commission had been not otherwise revoked, and he had received no notice of any change in his position. *Robertson v. Freeman*, 298.

#### COVENANT.

1. *Pleading.*]—Declaration, by ex-

ecutor of S., on a covenant made by defendant on the 10th of January, 1855, to pay S. £240, with interest, by six instalments of £40 each, on the 1st of August, 1855, and of each year following. Second plea, that by an agreement in writing, prior to the deed declared on, it was mutually agreed between defendant and S. that defendant should pay S. £210, in which sum defendant was then indebted to him, as follows: £35 on the 1st of August, 1854, and £35 on the 1st of August annually thereafter, and that such payments should be made in meat from defendant’s stall; and further, that defendant should execute a mortgage or deed to S. as security for the fulfilment of such agreement: that defendant did accordingly execute his mortgage or deed to S. for that purpose: that the said sum of £210 was fully paid to S. before his death: that defendant in all other respects kept the said agreement; and that the deed declared on is no other than the deed mentioned in such agreement, and so executed to secure the fulfilment of the same. *Held*, on demurrer, plea bad, for it was not alleged that the £210 formed any part of the £240 for which the covenant sued on was made, or that there was no other consideration for such covenant than to secure the £210.

Third plea, that by a certain deed, dated the 9th of July, 1856, made by defendant and S., it was agreed as in the second plea set forth; and to secure the performance by defendant of such deed it was agreed therein that defendant should sign a mortgage as a lien upon a certain conveyance or title theretofore given by S. to defendant: that defendant did execute such mortgage to S., and faithfully performed his part of said agreement,

and that the deed declared on is the mortgage so executed, and ought not to be enforced against him. *Held*, clearly bad, on the same grounds as the second plea, the absence of consideration for defendant's express covenant to pay the £240 and interest not being in any way shewn.

Fifth plea, that before breach of the covenant declared on, S. accepted from defendant the sum of £210 in goods in full satisfaction of said sum of £240, and of the cause of action declared on, and by deed released defendant therefrom. On demurrer to this plea except as to the allegation of release, *held*, that the rest might be rejected as surplusage, and that it shewed a good defence.

The sixth plea was, that before breach defendant satisfied and discharged the plaintiff's claim by delivering goods to S., which he accepted in full satisfaction. *Held* bad, as accord and satisfaction cannot be pleaded to a deed before breach. *Robison, Executor of the Very Rev. George O'Kill Stuart v. Flanigan*, 417.

2. *Judgment against division court bailiff for tort, held a bar to an action for the same cause against him and his sureties on their covenant.*—See DIVISION COURT BAILIFF.

*Action on covenant to repair, plea that injury caused by plaintiff.*—See LANDLORD AND TENANT, 3.

See LANDLORD AND TENANT.—LEASE.—MORTGAGE.

## COVENANTS FOR TITLE.

*Burden of proof.*—Where the plaintiff sues upon a covenant for right to convey land, alleging as a breach that defendant had no such right, and defendant pleads that he had, the proof of title lies upon defendant. *Mills v. Wigle*, 168.

*Sewerage rate not an encumbrance within the covenants—Commutation money not recoverable.*—See TAXES, 3.

## CRIMINAL LAW.

1. *Consol. Stats. C., ch. 99, sec. 66—Indictment for manslaughter—Right to convict of assault under.*—Under Consol. Stats. C., ch. 99, sec. 66, there can be no conviction for an assault unless the indictment charges an assault in terms, or a felony necessarily including it, which manslaughter is not. Where, therefore, the indictment was for manslaughter, in the form allowed by that act, charging that defendants "did feloniously kill and slay" one D., *Held*, that a conviction for assault could not be sustained. *The Queen v. Dingman and Corwin*, 283.

2. *Negligent escape—Conviction—Evidence.*—One W. was brought before magistrates in the custody of defendant, a constable, to answer a charge of misdemeanour, and after witnesses had been examined he was verbally remanded until the next day. Being then brought up again, and the examination concluded, the justices decided to take bail, and send the case to the assizes. He said he could get bail if he had time to send for them, and the justices verbally remanded him till the following day, telling defendant to bring him up then to be committed or bailed. On that day defendant negligently permitted him to escape, for which he was convicted. *Held*, that W. was in custody under the original warrant, and the matter still pending before the magistrates, until finally disposed of by commitment to custody or discharge on bail; and that the conviction was proper. *Regina v. Shuttleworth*, 372.

3. *Evidence—Right to contradict witness.*—Four prisoners being indicted together for robbery, one severed in his challenges from the other three, who were first tried, *Held*, that he was a competent witness on their behalf.

A witness called for the Crown gave evidence quite different from a previous written statement made by him to the prosecutor's counsel. He admitted such statement when shewn to him, but said it was all untrue, and made to save himself. *Per Adam Wilson, J.*—The prosecutor's counsel was properly admitted to disprove the witness's assertion as to how the statement came to be made, for the fact of its being obtained as he stated would tend very much to prejudice the prosecution, and was therefore not a collateral matter, but relevant. *Hagarty, J.*, inclined to the opinion that the witness having fully admitted his previous inconsistent statement, no further evidence relating to it should have been received. *The Queen v. Jerrett, Meyers, and Foster*, 499.

4. *False pretences.*—An indictment charging that defendant by false pretences did obtain board of the goods and chattels of the prosecutor. *Held*, bad, the term board being too general. *The Queen v. McQuarrie*, 600.

See CLERK OF THE PEACE, 1.

### CROWN GRANT.

*Patent issued for lots by numbers and concessions before survey made—Conflicting descriptions.*—See DESCRIPTION OF LAND, 2.

### CROWN LANDS.

See TAXES, 1, 7.

### CURRENCY.

*Lease by American and Canadian companies—Right to pay rent in American currency.*—See CONTRACT, 2.

### DAMAGES.

*Small—Leave to appeal refused.*—See DEFAMATION, 3.

*On Covenant for title.*—See TAXES, 3.

See ARBITRATION AND AWARD, 1.  
—INTERPLEADER, 1.

### DECLARATIONS.

*Against interest—Admissibility of.*—See EVIDENCE, 1.

*Of agent—How far binding on principal.*—See PRINCIPAL AND AGENT.

### DEED.

See DESCRIPTION OF LAND.

### DEFAMATION.

1. *Slander.*—Plaintiff and defendant were tailors, the latter also selling dry goods. Plaintiff went into defendant's shop to buy cloth to make up a pair of trowsers for one A., who was with him, when defendant said to A., "Don't you have anything to do with that man: that man will rob you; he is a rogue." He also asked A. to let him make the trowsers. The jury were directed that the words were actionable if spoken of the plaintiff in the way of his trade, and a verdict found for the plaintiff was held to be supported by the evidence. *Sloman v. Chisholm*, 20.

2. *Medical practitioners—Right to practise in U. C. under diploma from L. C.—Slander—Libel—Privileged communication.*—A medical practitioner duly licensed in either sec-

tion of the province may practise in the other without a fresh license. *Held*, therefore, that the plaintiff, who had a diploma from Lower Canada, was entitled to practise in the Upper Province, subject to any local laws affecting the profession there.

Defendant, being clerk of the peace, in a conversation with the sheriff as to the medical examination of a lunatic in gaol, said he would not employ the plaintiff, as he had not the Governor's license, adding that he thought the sheriff had more pluck than to ask him after what he, the defendant, had written, (referring to some article in a medical journal.) On being applied to by one M. on the plaintiff's behalf for an apology, he repeated that defendant was not a qualified physician in Upper Canada, and could not legally practise here without the Governor's license. *Held*, that both conversations were privileged; and that there being no evidence in either, and no extrinsic evidence of malice, there was nothing to leave to the jury.

The defendant also published a letter addressed to the editor of a public paper, in which he stated that the plaintiff was unlicensed. *Held*, that the learned judge might either have ruled this to be privileged, or at all events have left it to the jury with strong caution as to the usual liberty of discussion allowed in all matters of public interest, and with observations somewhat like those in the charge in *Turnbull v. Bird*, 2 F. & F. 508. *Shaver v. Linton*, 177.

3. *Slander—Evidence of character—Leave to appeal refused.*—*Held*, that in an action of slander evidence of the plaintiff's general bad character is inadmissible even in mitiga-

tion of damages. The verdict being for \$15, and such evidence urged only in mitigation, the court refused leave to appeal. *Myers v. Currie*, 470.

4. *Libel—Variance—Reference to a class—Proof that the plaintiff was intended—Slander of plaintiff in his business.*—A declaration for libel set out the following words: "The farmers, as a class of producers, are the only ones that I am aware of who allow another class, the purchasers of their produce, the sole right to weigh their produce, and helplessly submit to their decision.\* This state of things has introduced a class of men somewhat similar to Rob Roy, who call themselves commission merchants and wheat buyers, and make it their business to levy black-mail upon every man that sells them a load of wheat. This is done by a species of thimble-rigging performed on the platform scales, by which from five to ten bushels are taken from every hundred bushels bought;"—with an innuendo that all this was intended to charge the plaintiff with such practices.

In the libel proved at the place marked \* this sentence was contained: "This state of helpless dependency has been introduced with the platform scales, which the farmer has not yet learned to use; for when the balance scale was in use either party performed the operation of weighing, and fraud was soon detected." *Held*, not a substantial variance, for the same imputation appeared upon the writing with or without the part omitted. *Held*, also, that though a class only was described the plaintiff might be referred to, and that a verdict in his favour was justified by the evidence of witnesses who

stated this to be their understanding and belief.

In another count, for slander, the plaintiff alleged that he was a commission merchant buying wheat, and that the defendant spoke of him, in relation to his said trade, "I sold wheat to Mr. Marsden, and he cheated me out of two bushels of wheat, and when I went to try the scales he finger-rigged some screw about the scales, and threw on some weight at the same time, and I will not patronise him any more." *Held*, clearly a slander of the plaintiff in his business. *Marsden v. Henderson*, 585.

### DELAY.

*In moving against judge's order.*—  
See INTERPLEADER, 2.

### DEMAND.

*Bond to account and pay over on demand—Sufficiency of demand on one of three executors.*—See BOND, 1.

*Bond by two obligors to deliver goods seized under execution at such time and place as the sheriff may appoint—Demand on one held sufficient.*—  
See BOND, 2.

### DEMAND OF POSSESSION.

See LANDLORD AND TENANT, 4.

### DEMURRER.

See ARBITRATION AND AWARD, 3.  
BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

### DESCRIPTION OF LAND.

1. *Deed—Construction.*—The north half of lot 24 in the second concession of Darlington, according

to the original survey, contained 108 acres. B. conveyed to defendant "the south 100 acres of the north half," and afterwards to the plaintiff "eight acres, more or less, being the north eight acres of lot 24," &c., "and being all the north half of said lot contains over 100 acres." The Kingston road, not being an original allowance, but substituted for it owing to natural obstructions, ran through the south part of the north half, taking up two acres, and had been established as a highway by user for forty years. Whether it existed before the deed to defendant, or whether the soil had become vested in the Crown under our statutes, did not appear. *Held*, that the deed to defendant could cover only 100 acres in all, not exclusive of the road, and that the plaintiff was entitled to the remaining eight acres. *Ash v. Somers*, 191.

2. *Construction of patents—Rear boundary of the first concession of Chatham—Lands granted before survey.*—The question upon the following facts was as to the depth of lot 20 in the first concession of Chatham, whether it extended 58 or 66½ chains back from the river Thames—the plaintiff, who owned it, contending for the latter boundary:—

In 1792 this lot was described for patent to Edward Watson as commencing at a post on the river, on the limit between 19 and 20, and running thence north 67½ chains, more or less, to another post, &c., containing 200 acres, more or less. No patent ever issued on this description, and no trace of the post referred to could be found.

In 1803 a patent issued to Hugh Holmes for lot 20 in the 2nd concession, adjoining this lot to the north, described as "com-

mencing at the south-east angle of the said tract, being the north-east angle of lands granted to Edward Watson;" and after giving the northern and western courses, "then south 45° east 66 chains 30 links, more or less, to the rear boundary of lands granted to the said Edward Watson; then along the said boundary to the place of beginning," containing 200 acres, more or less.

In 1804 a patent issued to James McGarvin for lot 20, in the first concession, described as commencing in front on the river Thames, at the south-east angle of the said lot, then north 45° west 58 chains, more or less, to within one chain of the lands granted to Hugh Holmes," &c.

The only survey of which there was any evidence was in 1809, a plan of which shewed a road between the first and second concessions, 58 chains from the river. This had never been opened, but a blazed line was said to exist on the ground corresponding to it.

Several other patents for lots in the same concession had been also issued before 1809, among them one for the adjoining lot 19, in 1802, which was described as running back 68 chains from the river, and then going easterly to lot 20. Fifty-eight chains in depth would give to lot 20 only 153 acres.

Defendant claimed through Holmes. The plaintiff claimed through McGarvin, by a chain of title commencing with a deed from the sheriff in 1811, under an execution against McGarvin, of lot 20 in the first concession, containing 200 acres, more or less, giving no metes or bounds, and ending with a conveyance to the plaintiff in 1843, in which the lot was described as containing 200 acres of land,

"bounded in front by the river Thames, in the rear by the allowance for road between the first and second concessions, on one side by lot No. 19, and on the other side by lot No. 21."

*Held*, that the grant to McGarvin carried the lot back 66½ chains, for—1. That the patent to Holmes, on which that to McGarvin depended, was not avoided by the reference to Watson's land as *granted* when no patent had issued, the land *described* to him being clearly intended: that Holmes' grant clearly could include nothing contained in the description to Watson, and that McGarvin was entitled to go back to within one chain of Holmes, the distance of 58 chains being given as approximate only.

2. That as several lots had been granted by numbers and concessions before 1809, the presumption was that some general survey had been previously made; and that, as this was not shewn to have been done away with, the conveyance to the plaintiff, though after 1809, might be held to refer to it, and not to the concession laid out in that year, which would have confined him to 58 chains. And that the plaintiff was therefore entitled to succeed. *Martin v. Crow*, 485.

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## DEVISE.

See WILL.

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## DISCHARGE.

*Certificate of discharge of mortgage, effect of.*—See LANDLORD AND TENANT, 1.

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## DISTRESS.

See LANDLORD AND TENANT, 1.—TAXES, 6, 7.

## DIVISION COURT BAILIFF.

*Misconduct—Action against his sureties—Prior judgment against the bailiff.*—The plaintiff sued C., a division court bailiff, and his sureties, on their covenant that the bailiff would not misconduct himself in office, alleging a judgment recovered by himself against C., for selling his goods under execution contrary to the orders of the plaintiff in the suit, and a *fi. fa.* on such judgment returned *nulla bona* as to part, and claiming to recover the balance. *Held*, (affirming the judgment of the county court,) that the declaration was bad; for the plaintiff having recovered judgment against C. for the tort, could not afterwards sue upon the covenant for the same cause of action. *Sloan v. Creasor et al.*, 127.

See DIVISION COURTS.

## DIVISION COURTS.

*Division Courts Act, secs. 199, 200—Warrant issued by J. P., without affidavit—Action for seizure under—Secs. 196-198, construction of—Time of seizure—Second seizure—Liability of magistrate.*—Defendant M., a magistrate, gave a warrant to defendant K., a constable, on the 23rd of September, under sec. 200 of the Division Courts Act, to attach the goods of G. in the possession of the plaintiff and others, who were about to abscond. Under this certain goods were seized; and to an action brought against the constable, the magistrate, and the creditor, the constable, K., pleaded not guilty, by secs 196, 197, and 198 of the act. *Held*, that these sections had clearly no application, for K. was not shewn to be a bailiff of any division court, and had no warrant from the clerk.

The magistrate having issued such warrant without the affidavit required, *Held*, that he had no jurisdiction whatever, and was therefore a trespasser.

The first seizure took place on the 23rd of September, but the goods were then left with the plaintiff, on his giving a receipt, and on the 25th they were taken away by defendants K. and the creditor. The notice of action was for the seizure on the 25th. It was left to the jury to say when the actual seizure took place, and they found that it was on the 25th. *Held*, that this was a new trespass, for which the magistrate was liable, and a verdict against him was upheld. *Gray v. McCarty, Keys and Whelan*, 568.

See CLERK OF THE PEACE, 2.—  
DIVISION COURT BAILIFF.

## DOCTOR OF MEDICINE.

*Right of medical practitioner licensed in one section of the province to practise in the other.*—See MEDICAL PROFESSION.

## DOWER.

*Satisfaction—Lease.*—Dower.—*Plea*, that demandant from the 2nd of November, 1858, had been tenant of the premises to defendant under a demise at the rent of £15 a year, one-third of which she was to retain and still does retain for her dower, and the demandant accepted the same in lieu of her dower; and so the tenant averred that she assigned to demandant and demandant accepted her said dower. To support this plea, the following instrument was put in, signed by the demandant only, not under seal: "I do hereby attorn to C. S. for (describing the land) and I agree

to become her tenant therefor at the yearly rental of £15 a year, with taxes, payable quarterly from this date, one-third of which I am to retain as my dower, and the remaining two-thirds to be paid to C. S. during her life. And in case a higher rent can be obtained for said premises, I agree to quit on receiving three months' notice previous to the end of any quarter." *Held*, that the plea was not proved, for the instrument passed no interest in the land to demandant, and could not bar the right to dower or be treated as a satisfaction of it. *Sarsfield v. Sarsfield*, 59.

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### DRAINS.

See SEWERS.

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### DUPLICITY.

See PLEADING.

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### EJECTMENT.

1. *Right to try question of boundary—Conflict of opinion.*—It was held by this court that at a former trial the question of boundary should have been tried in this action of ejectment. The Court of Common Pleas held differently upon the same point in other cases; and the Chief Justice of that court having at a second trial ruled in accordance with their judgment, a new trial was granted without costs. *Irwin v. Sager et al.*, 22.

2. *Proof of title.*—In ejectment against two defendants, the plaintiffs proved a mortgage in fee made by one while he was in possession as owner, and duly assigned to them, and that the other defendant came in after, without shewing how. *Held*, sufficient, *prima facie*,

to entitle the plaintiffs to a verdict against both. *Eccles et al. v. Pater-son et al.*, 167.

*Upon conveyance of old road allowance—Proof required.*—See ROADS, 1.

See LANDLORD AND TENANT, 4.

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### ENTRY.

See LANDLORD AND TENANT, 1, 2.

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### ENTRIES AGAINST INTEREST.

*Admissibility of.*—See EVIDENCE, 1.

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### EQUITABLE PLEADING.

See INSURANCE, 1.—LEASE.

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### ESCAPE.

*Negligent escape—Conviction—Evidence.*—See CRIMINAL LAW, 2.

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### ESTATE.

See WILL.

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### ESTATE TAIL.

See WILL, 4.

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### ESTOPPEL.

*Use and occupation—Former recovery in replevin by under-tenant of defendant against plaintiff—Estoppel—Pleading.*—To an action for use and occupation defendant pleaded by way of estoppel, that one C. sued the plaintiff for taking his goods on the same premises: that the plaintiff avowed under a demise to the present defendant for twelve months' rent in arrear: that issue was taken on such avowry, and C. recovered judgment against the now plaintiff for £28, for such

wrongful taking and costs: that C. was in possession at the time of said taking under and from the now defendant, and with his privity; and that the alleged arrears of rent distrained for was the same claim now made for use and occupation. *Held*, on demurrer, plea bad as shewing no estoppel, for the judgment pleaded did not necessarily shew that no rent was due at the time of the distress mentioned, but might have been obtained on some other ground. *Quere*, whether judgment in replevin could be a bar to an action for use and occupation. *Quere*, also, whether defendant in this case could plead the judgment recovered by C. as an estoppel in his own favour. *Crooks v. Bowes*, 219.

See BOND, 2.—LANDLORD AND TENANT.

### EVICITION.

*Evidence of.*]—See LANDLORD AND TENANT, 1.

### EVIDENCE.

1. *Entries against interest—Admissibility of.*]—In an action by the executors of A., the father, against the executrix of B., the son, on an agreement said to be lost, to recover £300 alleged to have been lent by A. to B., the defence was that the money was a gift, on condition that the son should pay the father an annuity at the rate of four per cent. during his life. It was clearly proved that the £300 was advanced by A. to B., and that B. gave a note or writing of some kind for it; and it appeared that A., during his lifetime, had, in October, 1861, sued B.'s executrix for the money. B. died on the 15th of June, 1861. The plaintiff

gave in evidence the following receipt, signed by A., dated April 28th, 1861, which had been found among A.'s papers, wafered to a memorandum-book kept by him: "Received from my son Stephen Ganton" (above referred to as B.) "the sum of forty-eight dollars for interest of £300 at four per cent., due the 1st day of May next, according to agreement, which I cannot find, so I have put the receipt on this paper." There was no evidence to shew at what time this was made. Defendant put in the following receipt, also signed by A., dated May 3rd, 1858: "Received from my son Stephen Ganton the sum of twelve pounds, being one year's annuity due to me according to agreement bearing date May the first, 1858." *Held*, that the first-mentioned receipt was inadmissible for the plaintiff as an entry against interest; for though it admitted the receipt of \$48, yet it supported a claim for £300 by stating the existence and loss of the agreement, and describing the payment as interest instead of an annuity, as in the previous receipt; and the whole entry therefore was much more for the declarant's interest than against it. *Benjamin Ganton, Executor of Stephen Ganton the Elder, v. John Size and Anne Size his Wife, Executrix of Stephen Ganton the Younger*, 473.

2. *Secondary evidence.*]—*Held*, that upon the evidence in this case there was no sufficient proof of the execution of the lease under which defendants claimed to let in secondary evidence of it. *Dickson v. McFarlane et al.*, 539.

*Res gestæ—Evidence admissible as part of.*]—See CORPORATIONS.

*Action on covenant for right to*

convey — *Burden of proof.*] — See COVENANT FOR TITLE.

*Criminal Law—Right of the Crown to contradict its own witness.*]—See CRIMINAL LAW, 3.

*That words were spoken of plaintiff in the way of his trade.*]—See DEFAMATION, 1, 4.

*Of plaintiff's general bad character inadmissible in slander.*]—See DEFAMATION, 3.

*Of malice, when communication privileged.*]—See DEFAMATION, 2.

*Of title in ejectment.*]—See EJECTMENT, 2.

*Of foreign judgment.*]—See FOREIGN JUDGMENT.

*Of agency.*]—See PRINCIPAL AND AGENT.

*Ejectment upon conveyance of old road allowance—Evidence required.*]—See ROADS, 1.

*In action of seduction.*]—See SEDUCTION.

*Of taxes being in arrear, in ejectment on sheriff's deed.*]—See TAXES, 8.

See APPEAL.—CORPORATIONS.—INSURANCE.—INTERPLEADER, 1.

## EXECUTION.

*Against lands—Irregularity.*]—A return of a *fi. fa.* goods in the county where the venue is laid is sufficient to warrant a *fi. fa.* lands to any other county, without a writ against goods there also; but both writs cannot run together in the same county. In this case a *fi. fa.* goods had issued both to Wentworth, where the venue was, and to Hastings. That to Wentworth was returned *nulla bona*, and the plaintiff then issued a *fi. fa.* lands to Hastings, where the writ against goods

was still current, and a seizure had been made under it. *Held*, that the *fi. fa.* lands was irregular, and must be set aside. *Oswald v. Rykert et al.*, 306.

See DIVISION COURT BAILIFF.—DIVISION COURTS.—GARNISHMENT.—INTERPLEADER.

## EXECUTORS.

*As to the necessity of a demand on all when a demand on executors is required.*]—See BOND, 1.

See POSSESSION.

## EXEMPTION.

*From taxation.*]—See TAXES, 5, 7.

*From tolls.*]—See TOLLS.

## FALSE PRETENCES.

See CRIMINAL LAW, 4.

## FINALITY.

See ARBITRATION AND AWARD, 2.

## FI. FA.

See EXECUTION.

## FOREIGN JUDGMENT.

*Proof of—Consol. Stats. C., ch. 80, sec. 1.*]—In an action on a judgment recovered in the tenth judicial district of the state of California, the plaintiff put in evidence an exemplification, under a seal which purported by the impression to be that of the *fourteenth* district, and the certificate of the clerk of the court verifying it was stated to be under the seal of his office, not the seal of the court. *Held*, affirming the judgment of the Common Pleas in an action on the same judgment, that the proof was insufficient. *Junkin v. Davis et al.*, 369.

## FOREIGN LAW.

*Lease by American and Canadian companies—Right to pay rent in American currency.*—See CONTRACT, 2.

## FORMER RECOVERY.

*Against bailiff for tort—Held a bar to action of covenant for the same cause against his sureties.*—See DIVISION COURT BAILIFF.

*In replevin—Pleaded as a bar to action for use and occupation.*—See ESTOPPEL.

## FRAUD.

*Mortgage given for notes—Fraudulent representation that it was a first mortgage—Right to sue on the notes.*—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

*Defendants without notice not affected by.*—See GARNISHMENT.

See CHATTEL MORTGAGE.—INSURANCE.

## GARNISHMENT.

1. *Garnishment—Pleading.*—It is no defence to an action for a debt that attaching orders have been served upon defendant for the claim, or that he has been ordered to pay it over, under the garnishment clauses of the C. L. P. A. There must be payment on such orders, or execution levied on defendant. *Sykes et al. v. The Brockville and Ottawa Railway Company*, 459.

2. *Mortgage—Sale under power—Garnishment of surplus—Trust money—Payment of prior mortgage.*—The Trust and Loan Company held a mortgage from one O., with power of sale for cash or upon credit, and under it on the 22nd of November

sold the land to C., who paid them part in cash and gave a mortgage for the balance. There was a mortgage upon the land to one D., executed before but registered after theirs, and they paid to D.'s assignee out of the cash received the surplus of the whole purchase money above their claim. Their mortgage declared that they should stand seized of the proceeds of any sale in trust to apply it as there mentioned. A judgment creditor of O., having served his attaching order on the 25th of November, sued the company as garnishees for such surplus. *Held*, that he could not recover, for, 1. Defendants were trustees, and could not be sued at law for the money, even if they had wrongfully paid it over to D.; and 2. They were justified in so paying, notwithstanding the jury found that D.'s mortgage was fraudulently kept alive for O.'s benefit, for defendants had no knowledge of such fraud. *Smith v. The Trust and Loan Company of Upper Canada*, 525.

See ATTORNEY, 2.

## GOODS SOLD AND DELIVERED.

*Want of privity.*—The plaintiff brought ejectment against D.; and hearing that D. was about to remove a barn upon the lot in dispute to certain other land which he had leased from defendant, he went to defendant and told him that it was his. D. afterwards took the barn there, though defendant forbade him; and the plaintiff then sued defendant for it as for goods sold and delivered. *Held*, that, even assuming the barn to be a chattel, he could not recover, for there was no contract or privity between them. *Best v. Boice*, 439.

## GREAT WESTERN RAILWAY COMPANY.

See CONTRACT, 2.—CORPORATIONS.

## GROUND OF OBJECTION.

*Insufficient statement of in rule nisi for new trial.*—See PRACTICE.

## HABENDUM.

*Application of to premises.*—See WILL, 4.

## HIGHWAY.

See APPEAL.—ROADS.

## INNKEEPER.

See LIEN.

## INSURANCE.

1. *Mutual insurance company—Misrepresentation—Encumbrance—Consol. Stats. U. C., ch. 52, sec. 27—Equitable pleading.*—To an action against a mutual insurance company defendants pleaded a false representation by the plaintiff on obtaining a policy, that the land on which the building stood was unencumbered, whereas in truth it was mortgaged to one S. for £94. The plaintiff called S., who proved that at the time of effecting the policy about \$100 was due on the mortgage, after allowing all proper credits, and that the plaintiff was not then entitled to a release as of right.

*Held*, that the plaintiff could not recover, the policy being void under defendants' act of incorporation, Consol. Stats. U. C., ch. 52, sec. 27; and that evidence as to the value of the land was properly rejected.

The plaintiff replied, on equitable grounds, in substance, that he acted as agent for S., on the agreement that any moneys due to him for

services should be credited on account of this mortgage: that before applying for the policy he delivered to S. a claim against a certain person, which S. accepted: that these moneys together then equalled the mortgage debt, and the same was then cancelled and paid, and S. ready to release the mortgage: that before applying the defendants delivered to plaintiff a printed form of application, and thereby required him to state that the land was unencumbered, and to make the statements in his application, in the replication set forth, wherefore the plaintiff made such statement in his application, and by the procurement of defendants, and therefore the statement was not false or fraudulent. *Semle*, that the replication, which was demurred to, was clearly bad, but as the evidence disproved it no formal judgment was given on the demurrer. *Muma v. The Niagara District Mutual Insurance Company*, 214.

2. *Insurance—Change and increase of risk—Construction of conditions—Pleading.*—To a declaration on a policy of insurance against fire, subject to certain conditions endorsed, defendants pleaded, first, that these conditions provided that in the assurance of buildings containing any furnace, &c., the construction of the same must be particularly described when effecting the insurance, or if subsequently introduced, due notice given to the company and the same sanctioned: that if after insurance the risk should be increased by any means within the control of the assured, or the premises occupied in any way so as to render the risk more hazardous than at the time of assuring, unless such alteration or addition should be allowed by endorsement on the

policy, the assurance should be void. And defendants alleged that after effecting the insurance the plaintiff made divers alterations and additions to the building, and in such additions introduced two furnaces, of which said furnaces being introduced defendants had no notice or knowledge, whereby the policy became void. *Held*, on demurrer, plea bad, for the condition provided only against furnaces introduced into the building assured, not into additions made to it.

The second plea was, that after the policy divers erections, which were within the plaintiff's control, were added to the buildings insured, whereby the risk was increased, without the defendants' knowledge or consent.

To this the plaintiff replied, that by a condition of the policy, in case the risk should be increased by the erection of buildings, &c., it should be optional with the company to terminate the assurance: that the increase of risk was so occasioned, as alleged in the plea, and defendants did not terminate the assurance as provided for in the condition; and that said policy is valid and subsisting. *Held*, that the replication was clearly bad, it being admitted, as stated in the plea, that defendants had no knowledge of the buildings being erected.

The plaintiff also took issue on this and other pleas. At the trial it was proved that an addition had been made, in which a boiler was placed, and steam carried thence into the main building, from which certain furnaces were then removed. The jury gave a verdict for the plaintiff on the second plea, and found that the external risk was increased, the internal risk diminished, and on the whole the risk

diminished by the alterations. *Held*, that the plea was proved, and defendants entitled to have a verdict entered for them upon it, on leave reserved.

Thirdly, defendants pleaded that by another condition all assurances, original or renewed, should be considered as made under the original representation, so far as it might not be varied by any new representation in writing, which in all cases it should be incumbent on the assured to make when the risk had been changed, either within itself or by the surrounding or adjacent buildings; and defendants averred that although after the original representation new buildings were erected adjacent to and around the buildings insured, and although the risk was changed thereby, yet the plaintiff did not make to defendants any new representation in writing of such new buildings, or of the change of risk, whereby the policy became void.

*Per McLean*, C. J., the plea shewed a good defence. *Per Hagarty*, J., not; for the change here occurred before the time for renewing the policy, and the condition did not bind the plaintiff to make a new representation until then. *Sillem v. Thornton*, (3 E. & B. 868,) distinguished, as the alterations there seemed to have been in progress when the policy was effected. The decision of the demurrers, however, was necessary only as regarded costs, for the judgment on the second plea determined the action. *Lomas v. The British America Assurance Company*, 310.

## INTEREST.

*Common count for interest—Pleading.*—Account for the interest upon and for the forbearance of money

due from defendant to plaintiff, and forborne by the plaintiff to defendant at his request, *at the rate of thirty per cent. per annum*: *Held*, good as a common count, for that the rate stated was wholly unimportant, as would be the price of goods sold if alleged. *Bleakley v. Easton*, 348.

### INTEREST (ENTRIES AGAINST).

*See EVIDENCE*, 1.

### INTERPLEADER.

1. *Action against execution creditor—Evidence — Damages.*—In an action against the execution creditors, by the claimant of the goods sold, after the decision of an interpleader issue in his favour: *Held*, 1. That the accepting and contesting the interpleader issue formed no evidence to make defendants liable for the previous seizure by the sheriff; and this having been left to the jury as tending to establish their liability, in conjunction with slight evidence of a direct order to seize, a new trial was granted without costs. 2. That for any loss sustained after the date of the interpleader order, (that is, in this case for the sale of the goods by the sheriff under value,) defendants were not liable. *Kennedy v. Patterson et al.*, 556.

2. *Right to restrain an action against the execution creditor—Time for moving against order —Jurisdiction when goods owned by foreigner.*—*Held*, on the authority of *Carpenter v. Pearce*, (27 L. J. Ex. 143,) that a judge has authority by interpleader order to restrain an action against the execution creditor as well as against the sheriff.

*Held*, also, that an application against such order was too late after the lapse of four terms, the affidavit of the claimant that he knew nothing of it until shortly before the term in which he applied being inconsistent with the statements of his counsel, and with other facts sworn to. The rule that an order in Chambers must be moved against in the ensuing term applies even to orders made without authority.

The claimant, a resident of the United States, having placed the goods here, would have been personally liable to the jurisdiction of this court in any question concerning them, even if he had not employed an attorney and made an affidavit to support his claim. *Buffalo and Lake Huron R. W. Co. v. Hemmingway*, 562.

### JOINT-STOCK COMPANIES.

*See STOCK.—TOLLS.*

### JUDGE'S ORDER.

*Time for moving against.*—*See INTERPLEADER*, 2.

### JUDGMENT.

*Recovered against division court bailiff for a tort, held a bar to action for the same cause against his sureties on their covenant.*—*See DIVISION COURT BAILIFF.*

*Proof of foreign judgment.*—*See FOREIGN JUDGMENT.*

### JUDGMENT RECOVERED.

*See DIVISION COURT BAILIFF.—ESTOPPEL.*

### JUDGMENT NON OBSTANTE.

*See BOND*, 2.

## JURISDICTION.

*Of magistrates, in issuing attachment against absconding debtors.]—*  
See DIVISION COURTS.

See INTERPLEADER, 2.

## JURY.

1. *Jury law.*]—The court refused a mandamus to the clerk of the council of the city of Toronto to deposit with the clerk of the peace for the united counties of York and Peel the duplicate report of the selectors of jurors for the city liable to serve during 1863 for the counties, for, *Semble*, that under the Jurors' Act, the Municipal Act, and the act separating the city from the counties, the duty of selecting and drafting jurors for the city now belongs to the clerk of the recorder's court, and not to the clerk of the peace for the counties. *In re McNab, Clerk of the Peace for the United Counties of York and Peel, and Daly, Clerk of the Council of the City of Toronto*, 170.

2. *Jury expenses—Consol. Stats. U. C., ch. 31, secs. 155, 156—Mode of computation.*]—In computing the proportion of jury expenses payable by a city and county under the Jurors' Act, secs. 155, 156, the assessed value of the rateable property of the city, on which their proportion is calculated, is to be taken not as the assessed annual value, but as a sum of which that forms ten per cent.; *e.g.* if the annual value in any year be £6000, the share of the city is to be calculated upon £60,000. *The Corporation of the County of Middlesex v. The Corporation of the City of London*, 196.

*Fees payable to Clerk of the Peace.*]—See CLERK OF THE PEACE, 2.

*Sheriff's fees under the Jurors' Act.*]—See SHERIFF.

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## JUS TERTII.

See POSSESSION.

## JUSTICE OF THE PEACE.

See MAGISTRATES.

## LANDLORD AND TENANT.

1. *Action for rent by assignee of reversion—Effect of mortgage by plaintiff—Eviction, proof of—Evidence of assignment of term to defendant.*]—Action for rent due from March, 1855, by the plaintiff as assignee of the reversion against defendant as assignee of the term, the plaintiff's right to sue and defendant's liability being both disputed. As to the plaintiff's right, it appeared that one Stanton, being seised in fee, mortgaged the premises to C. in 1830, and in 1845 conveyed, subject to this mortgage, to one J. H. C. in trust. C.'s executors, in 1849, assigned the mortgage to P., who in July, 1853, proceeded to foreclose, and under a decree in that suit the premises were sold to the plaintiff, who received a conveyance from all the parties interested. On the same day the plaintiff, having paid off the mortgage to C., mortgaged to J. H. C. to secure the balance of the purchase money, payable in 1865, with a proviso that on payment the mortgage should be void. A discharge of this mortgage was recorded on the 2nd of September, 1861, the same day that this action was brought, and it was proved that two tenants who came in under March, the original lessee, paid rent to the plaintiff in 1857 and 1858.

As to defendant's liability, the plaintiff shewed that Stanton, in 1844, leased to one March for twenty-one years, who in August, 1853, assigned to one Philpotts. To prove

the assignment by Philpotts to defendant, who did not produce it upon notice, a memorial was produced from the registry office, executed by Philpotts, of a mortgage of the premises by him to defendant in August, 1853; and a bill to foreclose this mortgage filed in 1859, with a decree for sale of the land made in 1860, were also proved, under which it was shewn that defendant purchased the land. For the defence it was shewn that in February, 1857, the plaintiff filed a præcipe for summons in ejectment against March, on which a summons had issued, but the writ was not produced; and, further, that in March, 1855, J. H. C., by the plaintiff as his attorney, distrained for two years' rent up to that time. This action was for subsequent rent.

*Held*, 1. That but for the mortgage executed by the plaintiff to J. H. C., he would, under the 32 H. VIII., ch. 34, be entitled to sue as assignee of the reversion for rent accrued after March, 1855. 2. That the discharge executed on the same day when action brought could not enable the plaintiff to treat the mortgage as if it had never existed, and that without proof that the mortgage had been satisfied before the rent sued for or some portion of it had accrued, the action could not be maintained; and *quere* as to the plaintiff's right even with such proof. 3. That the distress made by J. H. C., through the plaintiff or his attorney, shewed that he as mortgagee entered then, and that from that time he, and not the plaintiff, must be taken to have been entitled to the rent. 4. That defendant, being the assignee of March, could not dispute Stanton's right to make the demise in question. 5. That the deed of 27th

July, 1853, shewed the plaintiff to be assignee of the reversion, for he took the fee by that deed, in which all parties interested joined in conveying to him. 6. That an eviction by the plaintiff for forfeiture, or an election by him to treat the lease to March as at an end, was not sufficiently shewn by the evidence as to the ejectment brought by him.

*Quere*, whether the assignment by Philpotts to defendant was sufficiently proved by the memorial produced executed by the assignee, and the evidence as to proceedings in Chancery by defendant. *Per Burns, J.*, there was enough to go to the jury. *Semble*, that if assignee by way of mortgage defendant would be liable without entry. *Jones v. Todd*, 37.

2. *Action for rent by assignee of reversion — Mortgage — Estoppel — Liability of mortgagee of the term.*]—S. having mortgaged certain land in fee afterwards leased it for twenty-one years, making no mention of such mortgage in the lease. He then conveyed to the plaintiff in trust, subject to the mortgage. P., the assignee of the mortgage, proceeded to foreclose, and under a decree in Chancery the land was sold, expressly subject to the lease, to J., who received a conveyance from S. and P. and the plaintiff, each using apt words ("bargain, sell, and release") to convey a legal estate in fee. On the same day J. mortgaged to the plaintiff to secure a balance of the purchase money. This mortgage had been discharged before action by certificate duly registered; and the plaintiff sued defendant, who was a mortgagee of the term by assignment, for rent accrued during the existence of the mortgage.

*Held*, 1. That defendant, as as-

signee of the term by way of mortgage, was liable on the covenant for rent, though he had never entered. 2. That though S. when he leased had only an equity of redemption, yet as this fact did not appear in the lease, he had a legal reversion by estoppel as against the tenant; and that such reversion passed to the plaintiff by the first conveyance from S., (which contained apt words to pass the legal estate,) though in it the mortgage was recited. 3. That the subsequent sale and conveyance being expressly subject to the lease, the reversion was not merged in the legal estate then derived by the plaintiff through P. and J.; and that the plaintiff being still bound by the lease, defendant was so as well. 4. That the plaintiff's discharge of the mortgage did not destroy his right of action for rent previously accrued; and that he was therefore entitled to recover. *Cameron v. Todd*, 390.

3. *Lease — Covenant to repair — Plea, injury caused by plaintiff.*—Defendant, by a lease to him from the plaintiff, covenanted to repair, and that if he should fail the plaintiff might do it and sue for the sum expended. To an action on this covenant for non-payment of money thus spent, defendant pleaded that the dilapidations so repaired were caused by the plaintiff wilfully, maliciously, and in the dead hour of the night, and the possession of the premises thus disturbed, contrary to the lease. *Held*, on demurrer, no defence, but the subject of a cross action only. *Kelly v. Moulds*, 467.

4. *Agreement — Construction — Tenancy — Covenants and conditions — Ejectment — Notice to quit and de-*

*mand of possession.*—Plaintiff and defendant being joint owners of certain land, the plaintiff assigned his interest to defendant, and defendant leased to the plaintiff for life at a nominal rent. On the same day, by articles of agreement between them under seal, which were to continue during the plaintiff's life, the plaintiff agreed to let defendant work the premises on condition that he should do so in a farmer-like manner, and deliver to him one-third of the proceeds, &c., which defendant covenanted to do, and each bound himself to the other in £1000 for the true performance of the agreement. Defendant went into possession, and the plaintiff had received some share of the crops according to the contract. On ejectment brought by the plaintiff, *Held*, that defendant by his entry became a tenant from year to year on the terms of the agreement; that he had a right to recover on breach of any of the conditions, notwithstanding there was a covenant also to perform them, and a penalty attached to the breach; and that no notice to quit or demand of possession were necessary. *Nathan Sheldon v. Smith Sheldon*, 621.

See CONTRACT. — DOWER. — ESTOPPEL. — OVERHOLDING TENANT. — TAXES, 7.

## LEASE.

*Rent payable quarterly in advance — Construction.*—The plaintiff sued in covenant for three quarters' rent, alleged to be payable by the lease quarterly in advance. Defendant pleaded as to the rent for the last quarter, commencing on the 1st of March, 1861, 1. That before the expiration of the first month of that quarter the plaintiff wrongfully evicted him. 2. That by a provi-

sion in the lease, in case of the mill demised being accidentally burned, the rent was thenceforth to cease, and that it was so burned on the 5th of March 1861. 3. On equitable grounds, as to the rent subsequent to the 6th of March, 1861, the same provision in the lease alleging the destruction of the mill by fire before the 6th. *Held*, on demurrer, pleas bad, for the rent, being payable in advance, was due on the 1st of March, and nothing which occurred afterwards could divest the plaintiff's right. *Ryerse v. Lyons*, 12.

*Secondary evidence of.*]—See EVIDENCE, 2.

*Lease by American and Canadian companies—Right to pay rent in American currency.*] — See CONTRACT, 2.

See DOWER. — LANDLORD AND TENANT.—TAXES, 7.

## LEGITIMACY.

*Presumption of.*]—See SEDUCTION.

## LEX LOCI CONTRACTUS.

*Lease by American and Canadian companies made in Canada—Right to pay rent in American currency.*] —See CONTRACT, 2.

## LIBEL.

See DEFAMATION.

## LICENSE.

*To practise medicine.*]—See MEDICAL PROFESSION.

## LIEN.

*Innkeeper—Lien on horses for keep—Special agreement.*]—One W. left his horses at the plaintiff's inn,

agreeing that he should retain them as security for their keep. He was a teamster, not living at the plaintiff's, and it appeared that he used the horses as he wished, sometimes keeping them away for several days, and that the plaintiff also used them when he chose, for which W. said he supposed the plaintiff would allow him against their keep. W. had had them away for three days, and had brought them back into the plaintiff's yard, when they were seized under a division court execution against W. In an action brought by the plaintiff for this seizure, the jury having found for the plaintiff, and the question whether the goods had before the seizure been actually returned into the plaintiff's possession not having been submitted to them: *Held*, that it could not be assumed that they had found this not to have been the case, and a new trial was granted without costs. *Crabtree v. Griffith*, 573.

## LIGHTS.

*Collision—Both vessels carrying wrong lights—Effect of on right of action.*]—See COLLISION.

## LIMITATIONS (STATUTE OF).

*Ejectment—Defective conveyance by married woman—Statute of Limitations.*]—Ejectment.—The land was granted to one Margaret McDonald, who with her husband executed a deed to one M. in 1831, but her name was not mentioned in it as a granting party, and there was no certificate of examination indorsed. The plaintiff claimed title through this deed by a conveyance to him in 1860 from the heir-at-law of one J. R., and he held also a deed from the heir-at-law of the patentee, executed in June,

1861. Defendants claimed through one W., who in 1845 purchased under an execution against J. R., and by possession.

It was proved that in 1834 J. R. went upon the land, and lived there till his death in 1843. His widow and family soon afterwards went to Scotland, leaving one K. in charge, who in 1845 accepted a lease for five years from W., and at the expiration of the term was ejected by W.'s vendee, under whom defendants came in, and held until September, 1861, when this action was brought. The husband of the patentee died in May, 1841, and the jury found that she had then knowledge of some one being in possession. She lived until 1851.

*Held*, that defendants were entitled under the Statute of Limitations, for the conveyance executed by her passed nothing, and twenty years had elapsed since her husband's death, during which possession had been held by parties with whom the plaintiff had no privity. *Malloch v. Martin Derivan and Patrick Derivan*, 54.

#### MAGISTRATES.

See CONVICTIONS.—CRIMINAL LAW, 2.—DIVISION COURTS.

#### MANDAMUS.

*Costs of application where both parties wrong.*—See CLERK OF THE PEACE, 1.

See JURY, 1.—SHERIFF.—STOCK.—TAXES, 4, 5.

#### MANSLAUGHTER.

*Right to convict of assault under indictment for manslaughter.*—See CRIMINAL LAW, 1.

#### MARRIED WOMAN.

*Defective conveyance by.*—See LIMITATIONS (STATUTE OF).

#### MEDICAL PROFESSION.

A medical practitioner duly licensed in either section of the province may practise in the other without a fresh license. *Held*, therefore, that the plaintiff, who had a diploma from Lower Canada, was entitled to practise in the Upper Province, subject to any local laws respecting the profession there. *Shaver v. Linton*, 177.

#### MEMORANDA.

282, 377, 472.

#### MISNOMER.

*Of municipal corporation in bond to them.*—See BOND, 1.

#### MISREPRESENTATION.

See INSURANCE.

#### MISTAKE.

*Land illegally assessed—Sale of—Action by purchaser to recover back purchase money.*—See TAXES, 1.

*In assessment rolls—Mandamus to correct refused.*—See TAXES, 4.

#### MONEY.

*Lease by American and Canadian companies—Right to pay rent in American currency.*—See CONTRACT, 1.

#### MONEY HAD AND RECEIVED.

*Assignment—Money had and received.*—F. had a demand against one T. on notes and acceptances of

about \$20,000. The plaintiffs agreed to transfer to him certain bank stock worth \$2550 as a loan, to secure which he agreed to assign, and afterwards delivered to them \$14,200 of these notes, all of which were negotiable, but some only were indorsed by F.—T. failed in Lower Canada, and F. obtained these notes from the plaintiffs to collect there for them. F. subsequently executed an assignment to the defendant for the benefit of creditors, including these notes in the schedule attached to it, but stating in the deed that they were held by the plaintiffs as security for their loan. All the money recovered from T. on F.'s whole claim against him (about \$300 excepted) came into the defendant's hands. *Held*, that the plaintiffs might recover from the defendant, as money had and received to their use, the amount of their loan out of the money received on the notes delivered to them as security; and if the amount paid by T. was paid generally on F.'s whole claim against him, then a sum founded on the proportion of such notes to the whole of T.'s debt. *Lee et al. v. Woodside*, 15.

*Money paid for purchase of land at tax sale—Land illegally assessed—Action by purchaser to recover.*—*See TAXES*, 1.

*Taxes paid under protest.*—*See TAXES*, 7.

### MORTGAGE.

*Omission of covenant to pay—Right of action—Evidence.*—Defendant, in consideration of \$530 acknowledged to be paid, assigned to the plaintiff a mortgage for \$360, with a proviso that the assignment should be void on payment of the \$530 and interest, *but no covenant*

*to pay.* *Held*, affirming *Hall v. Morley*, (8 U. C. R. 584,) that no action could be maintained on the common counts.

There was a special count, that in consideration that the plaintiff would assign to one H. a judgment which he had recovered against the defendant and M. for £133, 5s. 10d., the defendant promised to pay him that sum. The plaintiff's attorney swore that such judgment had been recovered, and at defendant's request assigned to H., defendant's son, defendant thinking that he could get the amount from M.; and that the mortgage was assigned as collateral security, but by mistake no covenant to pay was inserted in the assignment. Neither the judgment nor assignment of it however was proved. *Held*, that the motion for nonsuit was entitled to prevail, but a new trial was allowed on payment of costs. *Pearman v. Hyland*, 202.

*Sale under power—Garnishment of surplus.*—*See GARNISHMENT*, 2.

*Liability of mortgagee of the term for rent.*—*See LANDLORD AND TENANT*, 1, 2.

*See CHATTEL MORTGAGE.*—*EJECTMENT*, 2.—*INSURANCE*, 1.—*STOCK*, 3.

### MUNICIPAL CORPORATIONS.

*See BOND*, 1.—*CLERK OF THE PEACE.*—*JURY.*—*ROADS.*—*SEWERS.*—*STOCKS*, 3.—*TAXES.*

### MUTINY ACT.

*See TOLLS.*

### MUTUAL INSURANCE COMPANIES.

*See INSURANCE*, 1.

NEGLIGENCE.

See COLLISION. — ATTORNEY. — CRIMINAL LAW, 2.

NEW TRIAL.

*New trial—Practice.*]—Where the defendant having a witness in court did not call him, relying upon the weakness of the plaintiff's evidence, and desiring to have the last word to the jury, the court refused to set aside a verdict for the plaintiffs, though dissatisfied with it. *Hurrell et al. v. Simpson et al.*, 65.

*Conflict of opinion between the courts—Practice as to granting new trial.*]—See EJECTMENT, 1.

*Insufficient statement of grounds of objection in rule nisi for new trial.*]—See PRACTICE.

See AMENDMENT. — APPEAL. — LIEN. — MORTGAGE. — PRACTICE. — SHIPPING.—STOCK, 2.

NOTICE.

*Required to authorise by-law for conveyance of old road allowance—Must be proved in ejectment on such conveyance.*]—See ROADS, 1.

See FRAUD.

NOTICE TO QUIT.

See LANDLORD AND TENANT, 4.

OFFICE.

*Revocation of appointment.*]—See COUNTY ATTORNEY.

OFFICERS.

*In the army—Exemption from tolls.*]—See TOLLS.

ONUS PROBANDI.

*In action upon covenant for title.*]—See COVENANT FOR TITLE.

ORDER.

*Of judge in chambers—Time for moving against.*]—See INTERPLEADER, 2.

OVERHOLDING TENANT.

*Consol. Stats. U. C., ch. 27, secs. 58, 63.*]—A tenancy for an indefinite term at a monthly rent, subject to be put an end to by either party by a month's notice, is not within the *Consol. Stats. U. C., ch. 27, sec. 63*; and a precept to put the landlord in possession was therefore refused. The tenancy intended by that act is not one which can only be put an end to by notice, but one which comes to an end by the effluxion of a stipulated period, or perhaps by the happening of a particular event, as under a lease for the life of the lessor. *Patton v. Evans*, 606.

PARTIES TO ACTIONS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

PARTNERSHIP.

*Dissolution—Agreement to pay debts of the firm—Construction of.*]—The plaintiff and M. having been in partnership, on their dissolution M., with the two other defendants, agreed to pay the debts of the firm, and to relieve the plaintiff therefrom, in consideration of which the plaintiff assigned to defendants all accounts, &c., due to the firm. In an action against defendants for certain debts due by the firm, which the plaintiff alleged defendants had not paid, and for some of which the plaintiff had been sued, and judgment recovered, *Held*, that the plaintiff had no right of action, unless he had himself paid such debts. *Gray v. McMillan et al.*, 456.

## PAYMENT.

*Under attaching order, or order to pay over, necessary to form a defence for garnishee.*—See GARNISHMENT, 1.

*Lease by American and Canadian companies—Right to pay rent in American currency.*—See CONTRACT, 2.

See PARTNERSHIP.—STOCK, 3.

## PLEADING.

*Duplicity—Practice.*—To an action for a false return to a *fi. fa.* of goods on hand to the value of 1s., and *nulla bona* as to the residue, defendant by his first plea denied the return of goods on hand as well as the judgment alleged to have been recovered by the plaintiff. On demurrer to this plea, no one having appeared to support the demurrer, the court gave judgment for the plaintiff, but allowed defendant to amend on payment of 5s. costs. *Filliter v. Moodie*, 71.

See ARBITRATION AND AWARD, 2  
— ATTORNEY, 1.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.—BOND.—CONTRACT, 2.—CONVICTIONS.—COVENANT.—ESTOPPEL.—INSURANCE.—INTEREST.

## PLEDGES.

See MONEY HAD AND RECEIVED.—WAREHOUSE RECEIPTS.

## POSSESSION.

*Effect of as giving a right to sue for goods.*—Certain goods of testator were left in the house, where the plaintiff (his daughter) and her mother continued to live and use them for about a year, until the mother died, when defendant, who had been liv-

ing elsewhere, took possession of the house with these things, and refused to deliver them up to the plaintiff as the mother's executrix. *Held*, that the plaintiff had no such possession of these goods, either in her own right or through her mother, as to enable her to treat defendant as a wrong-doer; that as her mother's executrix she had no title; and that she therefore could not recover for them. *McCrary v. McCrary*, 520.

See LIMITATIONS (STATUTE OF).

## PRACTICE.

*Rule nisi—Grounds insufficiently stated.*—Several objections to the plaintiff's claim under a chattel mortgage were taken at the trial and overruled. A rule *nisi* was afterwards obtained for a new trial, on the ground that the mortgage, "together with the several renewals thereof, and the statements, papers, and affidavits to the same respectively attached, and all proceedings had and taken thereunder, are informal and irregular, and not according to the Consolidated Statutes of Upper Canada." *Held*, (affirming the judgment of the county court,) that the grounds of objection were insufficiently stated. *Strange v. Dillon*, 223.

*Rule for costs for not proceeding to trial—When it may issue—Rule of court No. 120.*—See COSTS.

See APPEAL.—ARBITRATION AND AWARD, 3.—ATTORNEY, 1.—BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.—CRIMINAL LAW, 1, 3.—DEFAMATION, 2.—EXECUTION.

*In case of conflict of opinion between the courts.*—See EJECTMENT, 1.

*Leave to appeal refused.*—See DEFAMATION, 3.

*Time for moving against judge's order.]—See INTERPLEADER, 2.*

*Amendment, after demurrer, allowed on payment of 5s. costs.]—See PLEADING.*

### PRESUMPTION.

*Of survey.]—See DESCRIPTION OF LAND, 2.*

*Of legitimacy.]—See SEDUCTION.*

### PRINCIPAL AND AGENT.

*Sale of land and goods—Evidence of agency.]—One D. McA., professing to act as agent for defendants, S. & F., on the 13th of January, 1859, bought the plaintiff's farm, mill, tannery, and loose property, for \$5400, of which \$1600 was for the loose property. An inventory of the articles was made out, and signed by the plaintiff, headed, "D. McA. bought of T.," (the plaintiff,) and with a memorandum at the foot, stating that the plaintiff had sold all his right in them to McA. McA. gave to the plaintiff defendants' bond, dated 4th of January, 1859, conditioned to convey to the plaintiff 300 acres of land in Iowa, and his own bond to convey to the plaintiff and his brother 68 acres there, to be taken from lands located by defendants and one P. On the same day (13th of January) the plaintiff conveyed to defendant S. alone 90 acres, and the plaintiff's brother conveyed to him 100 acres, which he said he held for the plaintiff. The plaintiff also conveyed to D. McA. 14½ acres, the tannery property, which in May, 1860, McA. conveyed to S. for a consideration expressed of £5. A witness present at the bargain said that some of the loose property was covered by defendants' bond, the smaller bond by McA. not covering it all,*

and 62 acres of the 68 was to go to the plaintiff for the part not covered. The witness said that at first the plaintiff refused McA.'s bond, but the latter said he and defendant were in partnership; and added, as the witness believed, that he had part of these lands himself; and then the plaintiff took it. The loose property was left on the farm bought by S. for some 18 months, and a letter was produced, of the 27th of June, 1860, from S. to one McC., stating that he did not know what property, if any, J. McA. had bought of his father, which was on the Thayer (plaintiff's) farm: that the property on this farm formerly in possession of D. McA. belonged to defendant, and J. McA. was merely his agent to take care of it.

*Held*, that upon the evidence there was nothing to shew that the chattel property sold nominally to McA. was in fact sold to defendants, or that McA. was authorised to buy it in their name, or to do more than sell for them the 300 acres in Iowa.

*Semble*, that McAlpine's declarations beyond the scope of his apparent authority could not bind defendants. *Thayer v. Street and Fuller*, 352.

*See INTERPLEADER, 1.—SHIPPING.*

### PRINCIPAL AND SURETY.

*Judgment for tort recovered against principal, held to prevent an action against surety on a covenant for the same cause.]—See DIVISION COURT BAILIFF.*

### PRIVILEGED COMMUNICATION.

*See DEFAMATION, 2.*

### PRIVITY.

*Want of, held to prevent action.]—See GOODS SOLD AND DELIVERED. See LIMITATIONS (STATUTE OF).*

## PROMISSORY NOTES.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES.*

## PROPERTY.

*In goods, does not pass by indorsement of warehouse receipts.]—See WAREHOUSE RECEIPTS.*

See *POSSESSION.*

## QUARTER SESSIONS.

See *CLERK OF THE PEACE. — SHERIFF.*

## RAILWAYS AND RAILWAY COMPANIES.

See *CORPORATIONS.—STOCK, 2, 3.*

## RATIFICATION.

See *INTERPLEADER, 1.*

## RECONVEYANCE.

*Fraudulent mortgage given for notes—Necessity for reconveyance before suing on the notes.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.*

## RECORDER'S COURT.

See *APPEAL. — CONVICTION. — JURY, 1.*

## REGISTRATION.

See *ATTORNEY, 1, 2.*

## RELEASE.

*Power of arbitrator to award.]—See ARBITRATION AND AWARD, 1.*

## REMAND.

See *CRIMINAL LAW, 2.*

## RENT.

*Lease by American and Canadian companies—Right to pay in American currency.]—See CONTRACT.*

*Right of assignee of reversion to sue for.]—See LANDLORD AND TENANT, 1, 2.*

See *LANDLORD AND TENANT.—LEASE.*

## REPAIRS.

*Of county roads.]—See ROADS, 2.*

See *LANDLORD AND TENANT, 3.*

## REPLEVIN.

See *ESTOPPEL.*

## REQUEST.

See *BOND.*

## ROADS.

*Conveyance of old road allowance—Ejectment under—Proof of notices before by-law—New road opened while title in the Crown—Surveyor's report—Confirmation of by-law.]—In ejectment for an allowance for road, claiming under a deed from the corporation of the township, the plaintiff proved a by-law, reciting that a public road had been opened through lot 27, in lieu of the original allowance between it and lot 26, and authorising a conveyance of the said allowance to the plaintiff, being the party through whose land such road had been opened. Held, that it was necessary for the plaintiff to prove the notices required by 20 Vict. ch. 69, sec. 8, to authorise the passing of the by-law.*

*When the new road was opened the patent for lot 27 had not issued. Per McLean, C. J., the plaintiff not having owned the land when the road was opened through, it was not entitled to the old allowance.*

*Hagarty, J.*, expressed no opinion on this point.

The surveyor's report required by 20 Vict., ch. 69, sec. 5, certified that the road opened answered the purpose of a public highway, not that it was sufficient for the purposes of a public road or highway, as the statute directs. *Semble, per McLean, C. J.*, not a substantial compliance with the act.

The 20 Vict., ch. 69, requires such a by-law before it can have any effect to be confirmed by the county council within a year from its passing. Before such confirmation the 22 Vict., ch. 99, repealed that act, saving all things done thereunder, and by it no confirmation of such a by-law was made requisite. *Semble, per Hagarty, J.*, that the confirmation of this by-law was not dispensed with. *Winter v. Keown et al.*, 341.

2. *By-law — Roads assumed by county—Repairs of—Uncertainty—Consol. Stats. U. C., ch. 54, secs. 339, 340, 342, sub-sec. 8.*]—A county council passed two by-laws: 1. Assuming certain roads within a township, and enacting that the undivided one-half of such roads should be kept in repair by the township corporation, and the undivided one-half by a village corporation named; and 2. A subsequent by-law, directing that \$400 should be raised thus, \$200 to be assessed and collected out of all the rateable property of the village, and \$200 of the township. *Held*, that both by-laws were bad; for as to the first, the portion of the road to be kept in repair by each municipality was not sufficiently defined; and as to the second, the county had no power to direct how the money required should be pro-

cured by the municipalities. *Per Adam Wilson, J.*, under the Municipal Act, secs. 339, 340, 342, sub-sec. 8, the county had no power thus to assume the roads and compel the local municipalities to improve them; that expense should be borne by the county. *In the Matter of Rose and The Corporation of the United Counties of Stormont, Dundas, and Glengarry*, 531.

*See* DESCRIPTION OF LAND, 1.—TOLLS.

## RULE.

*Rule nisi for new trial—Grounds insufficiently stated.*]—*See* PRACTICE.

## RULE OF COURT.

*As to setting down appeals from county courts, promulgated*, 166.

## SALE OF GOODS.

*See* PRINCIPAL AND AGENT.—WAREHOUSE RECEIPTS.

## SATISFACTION.

*See* ACCORD AND SATISFACTION.—DOWER.

## SCHOOLS.

*See* TAXES, 5.

## SECONDARY EVIDENCE.

*See* EVIDENCE, 2.

## SEDUCTION.

*Evidence—Child born after marriage to a stranger—Presumption of legitimacy.*]—The plaintiff's daughter was seduced by defendant, at whose house she was living, in May, 1860. In September she left him, and in October was married to one C. In February following

a child was born. In an action for the seduction, the court having held that the child being born in wedlock its mother's evidence to prove it illegitimate was inadmissible; at the second trial the fact that defendant was the father of the child was attempted to be proved by his admissions, and the jury again found for the plaintiff. *Held*, that the verdict was not supported by the admissions, stated in the case; and *semble*, that no evidence could be received to rebut the presumption of legitimacy. See *Ryan and Wife v. Miller*, 21 U. C. R. 202. *Quære*, whether if a clear loss of service before the marriage had been shewn the plaintiff could recover for it. *Ryan and Wife v. Miller*, 87.

#### SET-OFF.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 4.

#### SEWERS.

*Sewers—By-law to regulate—22 Vict., ch. 99, sec. 290, sub-secs. 18, 20.*—*Held*, that the 22 Vict., ch. 99, sec. 290, sub-secs. 18, 20, giving power to municipal corporations relating to sewers, applied to sewers already constructed by general taxation, not to those only which might afterwards be built.

The 18th sub-section authorises a by-law to compel the draining "of any grounds, yards, vacant lots, cellars, private drains, sinks, cesspools, and privies," and to assess the owners with the costs thereof if done by the council on their default; and the 20th sub-section "for charging all persons who own or occupy property which is drained," or required to be drained into a common sewer, with a reasonable rent for the use of the same. The by-law in ques-

tion enacted that "all grounds, yards, vacant lots, or *other properties* abutting on any street," should be drained, and fixed the rent to be paid. *Held*, not objectionable, as including other properties than those mentioned in the statute; for if the word "property" in the 20th sub-section could include only the kinds of property mentioned in the 18th, it might receive the same construction in the by-law.

The court inclined to think that the owner or occupier of the property might legally be allowed to commute for the annual rent by payment of a fixed sum, and refused therefore to quash the clause authorising such an arrangement.

The sewer rent not being a charge upon the land, *Held*, that payment of it could not be enforced by the same means as the ordinary assessments.

The sixth section of the by-law required all grounds, &c., not already drained, abutting on any street with a common sewer, to be drained into the same within fourteen days from the advertising of the by-law for one week; the seventh section imposed a penalty on any one of not less than \$1 nor more than \$10 for each month he should omit to do so; and the eighth provided for enforcing payment by distress or imprisonment not exceeding thirty-one days.

*Held*, that these sections must be quashed; for the 18th sub-section above mentioned shewed how the parties should be compelled to drain, *i.e.* by the council doing the work and assessing them for the costs; and the infliction of a penalty for each month, and imprisonment for thirty-one days, were wholly unauthorised. A subsequent by-law added to the eighth section above mentioned a proviso, that any person thereby required to construct a drain who should not do so, but should be

willing to pay the same rent as if he did use the sewer, should be exempt from the penalties. *Held*, that as the penalties were held illegal, this clause, founded on the assumed liability to pay them, must also be quashed. *In re McCutcheon and the Corporation of the City of Toronto*, 613.

*Sewerage rate not a tax on the land, and therefore not an encumbrance within covenants for title.*]—See TAXES, 3.

### SHERIFF.

*Jurors' Act, Consol. Stats. U. C., ch. 31—Sheriff's fees under—Right to review the audit of quarter sessions.*]—Under the Upper Canada Jurors' Act, secs. 105, 161, sub-sec. 4, the sheriff is entitled to charge only for such certificates of attendance as are demanded by the jurors. He cannot prepare them beforehand and charge whether they are asked for or not.

This court can compel the quarter sessions to audit the sheriff's accounts; but *semble*, such audit being a judicial duty, that they cannot review their discretion when exercised upon a question of fact. They refused therefore to interfere where the court of quarter sessions, after examining the bailiff *viva voce*, had disallowed certain mileage for serving jurors, sworn to in his affidavit.

The sheriff is entitled, under sec. 84 and sec. 161, sub-sec. 2, to charge for four copies of panels for the court of assize, \$4, *i.e.* two copies of the panel of Grand and Petit Jurors respectively, one to be sent to each of the Superior Courts at Toronto; and \$6 for copies of panels for the Quarter Sessions and County Court, *i.e.* for two copies of the panel of Grand and

Petit Jurors respectively for Quarter Sessions, and of Petit Jurors for the County Court. *In the Matter of Davidson, Sheriff of the County of Waterloo, and the Court of Quarter Sessions in and for the County of Waterloo*, 405.

*Bond to deliver goods seized under execution—Action on by sheriff.*]—See BOND, 2.

### SHIPPING.

*Ship's husband—Duties of—Proof of performance.*]—In an action upon an alleged agreement by defendants, that if the plaintiff would purchase for them a certain vessel, and would perform the duties of a ship's husband in respect of her, they would pay him five per cent. on her gross earnings up to the time of the last voyage for which he should as such ship's husband prepare her: *Held*, that upon the evidence, set out in the case, the plaintiff's contract was not shewn to have been performed, and the jury having found in his favour a new trial was granted. *Hall v. Duncan et al.*, 602.

See COLLISION.—CONTRACT.

### SLANDER.

See DEFAMATION.

### STATUTE OF LIMITATIONS.

See LIMITATIONS (STATUTE OF).

### STATUTES (CONSTRUCTION OF).

32 H. VIII., ch. 34.—See Landlord and Tenant, 1.

7 W. IV., ch. 19.—See Taxes, 6.

1 Vict., ch. 20.—See Taxes, 6.

3 Vict., ch. 46.—See Taxes, 6.

16 Vict., ch. 99.—See Corporations.

16 Vict., ch. 182.—See Taxes, 8.

20 Vict., ch. 69.—See Roads.  
 Consol. Stats. C., ch. 54.—See Warehouse Receipts.  
 Consol. Stats. C., ch. 66.—See Stock, 3.  
 Consol. Stats. C., ch. 70.—See Stock, 1.  
 Consol. Stats. C., ch. 76.—See Medical Profession.  
 Consol. Stats. C., ch. 80.—See Foreign Judgment.  
 Consol. Stats. U. C., ch. 19, (Division Courts Act.)—See Clerk of the Peace, 2.—Division Courts.  
 Consol. Stats. U. C., ch. 22, (Common Law Procedure Act.)—See Garnishment.—Practice.—Stock, 1.  
 Consol. Stats. U. C., ch. 27.—See Overholding Tenant.  
 Consol. Stats. U. C., ch. 30.—See Interpleader.  
 Consol. Stats. U. C., ch. 31, (Jurors' Act.)—See Jury.—Clerk of the Peace, 2.  
 Consol. Stats. U. C., ch. 40.—See Medical Profession.  
 Consol. Stats. U. C., ch. 42.—See Bills of Exchange and Promissory Notes, 4.  
 Consol. Stats. U. C., ch. 49.—See Tolls.  
 Consol. Stats. U. C., ch. 52.—See Insurance, 1.  
 Consol. Stats. U. C., ch. 54, (Municipal Act.)—See Roads, 2.  
 Consol. Stats. U. C., ch. 55.—See Taxes.  
 Consol. Stats. U. C., ch. 120.—See Clerk of the Peace, 1, 2.  
 Consol. Stats. U. C., ch. 124.—See Clerk of the Peace, 2.—Convictions.  
 22 Vict., ch. 116.—See Corporations.  
 25 Vict., ch. 5, (Mutiny Act, Imperial.)—See Tolls.

## STOCK.

1. *Sheriff's sale of stock—Action by purchaser claiming mandamus to transfer—C. L. P. A., secs. 255, 256, Consol. Stats. C., ch. 70.*—In an action by a purchaser of stock at sheriff's sale, claiming a mandamus to the company to enter the plaintiff in their register as a shareholder in respect of such stock: *Held*, that the provisions of Consol. Stats. C., ch. 70, as well as the C. L. P. A. secs. 255, 256, must be obeyed, and that as no copy of the writ had been served on defendants with the sheriff's certificate, the plaintiff must fail. *Goodwin v. The*

*Ottawa and Prescott Railway Company*, 186.

2. *Action by creditor of R. W. Co. against shareholder—Number of shares added after subscription—Conditional subscription—Surprise—New trial.*—In an action by a creditor of a railway company against stockholders for calls, alleging them to have subscribed for 40 shares, the defence was, first, that the name of the firm, consisting of three members, was signed by one of the partners, on the verbal condition that unless G., another partner, who was out of the country, should assent on his return it was not to bind, and that G. refused to ratify it; and, secondly, that the figures 40, shewing the number of shares, had been inserted after the subscription by some stranger. The name of G. was allowed to be struck out as a defendant, and the jury were asked to say whether the subscription was conditional, and whether the figures 40 had been inserted by the defendants or any one authorised by them. They found for the defendants, and that the figures were not written by the partner who subscribed nor any one authorised by him.

On motion for a new trial the plaintiff's attorney swore that this objection, as to the figures, had taken him by surprise, and that *he thought* he would be able to meet it by satisfactory evidence on another trial. In answer, the defendant who subscribed confirmed by his affidavit the finding of the jury. The court under these circumstances refused to interfere. *Quære*, as to the effect of such a conditional subscription. See *Moore et al. v. Gurney et al.*, 21 U. C. R. 127. *Moore et al. v. Edward Gurney, Charles Gurney, and Alexander Carpenter*, 209.

3. *Railway company—Action by creditor against shareholder under Consol. Stats. C., ch. 66, sec. 8—Payment of stock.*—In an action under the statute by judgment creditors of a railway company against a municipal corporation as shareholders, it appeared that the contractors for a portion of the road had received a lease from the railway company of that part for 999 years at a nominal rent, and as an inducement to the defendants and two other municipalities to take stock, they had mortgaged their lease to trustees to secure payment to such municipalities of six per cent. on the sums subscribed by them. This mortgage, to which the railway company were parties, provided for the payment by the municipalities of the amount of stock taken by each to the contractors as the work progressed, upon the estimates of the company's engineer, and the full amount of defendants' subscription had been thus paid. *Held*, that this was a payment of defendants' stock as against the plaintiffs, who therefore could not recover. *Woodruff and McMicken v. The Corporation of the Town of Peterborough*, 274.

### SURETY.

See PRINCIPAL AND SURETY.

### SURPLUSAGE (IN PLEADING).

See COVENANT.

### SURVEY.

See DESCRIPTION OF LAND, 2.

### TAXES.

1. *Sale invalid—Action to recover back purchase money.*—Where lands not assessable, no patent or license of occupation having issued for them, were improperly

sold for taxes, *held*, that the purchaser could not recover back the money in an action against the county. It did not appear in this case whether a conveyance had been executed to the plaintiff or not. *Austin v. The Corporation of the County of Simcoe*, 73.

2. *Collection of, after return of collector's roll — Pleading — Consol. Stats. U. C., ch. 55, secs. 24, 96, 103, 104, 110, 111, 112.*—After the collector's roll for the year has been formally returned the municipality cannot appoint any one to collect the unpaid taxes by distress; their collection belongs to the treasurer.

In an action of replevin the defendant avowed, setting out the assessment of certain taxes in the city of Kingston for the years 1855 and 1859, the delivery of the collector's rolls to the collector for those years, and their return by him, with the taxes hereinafter mentioned appearing unpaid; that he, the defendant, was duly appointed by resolution of the council, instead of the collector for those years, to collect certain taxes remaining unpaid after the return of said rolls: that certain persons named were set down and assessed on the said rolls as owner and occupant of certain real property for a sum mentioned, payment of which was duly demanded by the collector for those years: and that at the said time when, &c., (being in 1861,) the defendant took the goods in question as a distress for such taxes, the same being in the plaintiff's possession on the premises so assessed. *Held*, on demurrer, that the avowry shewed no defence, the council having under the circumstances no authority to make such appointment.

The plaintiffs in answer to the avowry pleaded several pleas, denying the assessment of the several parties as alleged, to which the defendant replied, so far as it might be intended to rely on any error in said assessments, that the collector's roll for said years were made out by the clerk from the assessment roll as finally passed, and the assessments in question correctly transcribed. *Held*, on demurrer, replication bad. *Holcomb et al. v. Shaw*, 92.

3. *Sewerage rate—Not a charge on the land—Commutation.*]—A sewerage rate imposed by by-law is not a tax upon the land, but a personal charge upon the owner. Where therefore the plaintiff purchased certain land from the defendants, in respect of which the sewer rate was for three years overdue, which the plaintiff paid, and also commuted for the entire rate as allowed by the by-law: *Held*, that he had no right of action for either of these sums, under the covenants in his deed for seizin and quiet enjoyment, free "from all arrears of taxes and assessments whatsoever due or payable upon or in respect of the said lands." *Seemle*, that even if the rate in arrear were an encumbrance on the land, the payment by way of commutation, being wholly optional, would not be recoverable under the covenant. *Moore v. Hynes et al.*, 107.

4. *Assessment rolls—Mistake—Correction—Mandamus.*]—One S. from 1858 to 1861, inclusive, occupied, as lessee, a house and land adjoining on lot 24, part of which lot in 1854 had been laid out by his landlord into village lots, and a plan filed. He had been regularly assessed and had paid for the premises thus occupied by him, but the whole of lot

24 had during these four years been returned as non-resident. After the treasurer had issued his warrant for sale to the sheriff, he was applied to to correct the mistake in the rolls, so as to except the part occupied by S. from that returned, but he refused to do more than allow the sheriff to deduct the amount paid by S., who to relieve his goods from seizure paid under protest the taxes on the remainder of lot 24, \$228. He then applied for a mandamus to the treasurer to make the correction, but the court refused to interfere. *In re Secker and Paxton, Treasurer of the County of Ontario*, 118.

5. *Roman Catholic separate schools—Claim of exemption by Protestants as subscribers to—Misconduct of clerk—Mandamus.*]—A rate having been imposed for the purpose of building a new schoolhouse in the town of Amherstburgh, certain persons who were not Catholics, but Protestants, signed a notice to the clerk, he himself being one of them, that as subscribers to the Roman Catholic separate school they claimed to be exempted from all rents for common schools for the year 1861; and the clerk, thereupon, in making up the collector's roll, omitted this rate opposite to their names. *Held*, that the clerk, who had been notified before making up the roll that it would be illegal to exempt these persons, had done wrong, and might be punished under Consol. Stats. U. C., ch. 55, secs. 171, 173, but that the court could not in the following year interfere by mandamus to compel him to correct the roll. *In the Matter of Ridsdale and Brush, Clerk of the Corporation of the Town of Amherstburgh*, 122.

6. *Sale for taxes in District of Ottawa in 1839—Lapse of time be-*

tween warrant and sale—7 W. IV., ch. 19—1 Vict., ch. 20—3 Vict., ch. 46—*Distress between inception and completion of sale, effect of.*—In ejectment on a sale for taxes of land in the district of Ottawa, made in June, 1839, it appeared that the land had been returned as in arrear for eight years to the 1st of July, 1828, £3, 5s., and for nine years up to the 1st of July, 1829, £3, 13s. 1½d., and a warrant issued on the latter return to sell for £3, 5s. The sheriff had returned the lot as sold to one M., and it was marked in the treasurer's books as "paid sheriff to 1st July, 1829." On the 17th of September, 1836, it was again returned as in arrear for eight years, to the 1st of July previous, £3, 5s., and a warrant to sell issued on the 20th, returnable at the Quarter Sessions on the 26th of June then next. On the 4th of March, 1837, the 7 W. IV., ch. 19, was passed, altering the mode of sale and directing that all sales should take place on the second day of the Quarter Sessions. This caused delay; and on the 6th of March, 1838, by the 1 Vict., ch. 20, all sales for taxes were postponed until the expiration of that year. On the 17th of April, 1839, the land was offered under the provisions of the 7 W. IV., ch. 19, and no bidders appearing, the sheriff adjourned the sale to and sold on the 19th of June, instead of waiting, as directed by that statute, until the Quarter Sessions next after the expiration of the six months' notice required. By 3 Vict., ch. 46, the sales made in June, 1839, were confirmed, and under the provisions of that act the sheriff in 1842 conveyed to the plaintiff.

*Held*, 1. That under these circumstances the warrant issued in 1836 had clearly not lapsed or become void before the sale. 2. That

there were in fact eight years' taxes in arrear at the time of sale, for the warrant issued in 1829 was for taxes only up to the 1st of July, 1828, though it might properly have been for another year in addition. 3. *Per McLean*, C. J., that the evidence of distress (set out in the case) having been left to the jury, who found for the plaintiffs, their verdict must be taken as shewing that there was none at any time before the sale. *Per Burns* and *Hagarty*, J. J., that the learned judge was right in directing the jury that the existence of distress between the 17th of April, when the land was first offered, and the sale on the 19th of June, would form no objection, as the sheriff was not bound to search then. *Quere*, whether in any case a search could be required between the inception and completion of the sale. *Hamilton et al. v. McDonald*, 136.

7. *Assessment—Property held for the Crown—Exemption—Consol. Stats. U. C., ch. 55, sec. 9.*—*Held*, affirming *Shaw v. Shaw*, 12 C. P. 456, that land leased to a commissariat officer on behalf of the Secretary of State for War, and occupied by her Majesty's troops, was exempt from taxation; and that a provision in such lease binding the lessee to pay all taxes to which the premises should be liable could make no difference; but where such land before the execution of the lease had been assessed to the lessor for that year, *Held*, that it was not discharged, but that as payment could not be enforced from the Crown, and the officer had paid to the collector under protest, the money might be recovered back. *The Principal Secretary of State for War v. The Corporation of the City of Toronto*, 551.

8. *Sale for taxes — Ejectment—Proof of taxes in arrear—Form of warrant—Advertisement.*—In ejectment upon a sale for taxes, made under 16 Vict., ch. 182. *Held*, 1. That the evidence of the treasurer, producing his official books, and shewing that the lands were charged with the taxes when the warrant issued, was sufficient proof of their being in arrear. *Quere*, whether the warrant alone would not suffice. 2. That the omission to distinguish in the warrant, as directed by the 56th section of the act, between lands patented and those under lease or license of occupation, was fatal.

*Semble*, that it is sufficient to state the lands to be sold in a schedule annexed to the warrant, if such schedule is expressly incorporated with it; but if the warrant mention no lands and the schedule is not so incorporated, *quere*—

*Semble*, also, that the omission to advertise in a local paper, as well as in the *Gazette*, would avoid the sale. *Jarvis v. Brooke*, 11 U. C. R. 229, commented upon. *Hall v. Hill*, 578.

### TENANT.

*See* LANDLORD AND TENANT.—LEASE.—OVERHOLDING TENANT.

### TITLE.

*Proof of in ejectment.*—*See* EJECTMENT, 2.

*To goods.*—*See* POSSESSION.

*See* COVENANTS FOR TITLE.

### TOLLS.

*Exemption from tolls—Officers—Mutiny Act*, 25 Vict., ch. 5—*Consol. Stats. U. C.*, ch. 49, sec. 91.]—The defendant coming in a private carriage to a toll gate on the Black-

friars road, near London, refused to pay, and passed through, on the ground that he was in uniform, and adjutant of the military train, and therefore exempt. Being brought up before a magistrate, he claimed exemption under the Mutiny Act, and was convicted for wilfully passing the gate without paying. *Held*, that the conviction was proper, for by the Mutiny Act, 25 Vict., ch. 5, sec. 72, he was exempt only if on duty, of which there was no evidence; and being in a private vehicle, he was expressly excluded from exemption under the Joint-Stock Companies Act, *Consol. Stats. U. C.*, ch. 49, sec. 91. *Held*, also, that the conviction could not be quashed on the ground of his being on duty, as the exemption had not been claimed on that account. *Held*, also, no objection that the toll gate did not appear by the conviction to be lawfully established. *The Queen v. Daves*, 333.

### TORONTO.

*By whom jury for the city are to be selected and drafted.*—*See* JURY, 1.

### TORT.

*Judgment recovered for tort against principal, held a bar to an action of covenant against surety on the same cause of action.*—*See* DIVISION COURT BAILIFF.

### TRESPASS.

*Against magistrate.*—*See* DIVISION COURT.

*See* INTERPLEADER.

### TROVER.

*See* POSSESSION.

TRUSTEES.

See GARNISHMENT, 2.

UNCERTAINTY.

*In award.*]—See ARBITRATION AND AWARD, 1.

*In by-law.*]—See ROADS, 2.

*In will.*]—See WILL, 4.

USE AND OCCUPATION.

See ESTOPPEL.

VARIANCE.

See AMENDMENT. — DEFAMATION, 4.—ROADS.

VENDOR AND VENDEE.

*Of goods.*]—See PRINCIPAL AND AGENT.—WAREHOUSE RECEIPTS.

WAREHOUSE RECEIPTS.

*Indorsement of — Consolidated Statutes Canada, ch. 54, secs. 8 and 9, Construction of.*]—The plaintiff declared that one G. had deposited with the defendant certain wheat, and obtained from him a warehouse receipt therefor: that by the course of trade such receipt was transferable by indorsement, and the property in the wheat would pass to an indorsee; that G. sold said wheat to the plaintiff, and indorsed to him the receipt; but that when he presented it to the defendant the latter refused to deliver to him the wheat. Defendant pleaded that before he had any notice or knowledge of such transfer or sale, the wheat was taken out of his warehouse by G.

*Held*, a good defence; for at common law the indorsement and transfer of the receipt would clearly not pass the property, and the Consol. Stat. C., ch. 54, relied upon by the plaintiff, has no application to an

absolute sale of goods, but to pledges only, to secure payment of a bill or note negotiated, or a debt contracted, when the receipt is indorsed over. *Glass v. Whitney*, 290.

WHEAT.

*Indorsement of warehouse receipts for — Effect of — Consol. Stats. C., ch. 54.*]—See WAREHOUSE RECEIPTS.

WILL.

1. *Estate for life or in fee.*]—Under the following devise, testator having died in 1830: "Touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form: first, I give and bequeath to P. B. two acres of land, (describing it;) also, I give to Sophia, the child whom I have raised, one feather bed, &c., (naming other personal property;) also, I give the remainder of my property, when my lawful debts are paid, to Sarah Brooke, my beloved wife: *Held*, following *Hurd v. Levis*, (19 U. C. R. 41,) that the widow took a fee in the land included in the devise to her. *Brooke v. McCaul*, 9.

2. *Condition against alienation.*]—Under the following will: "Should my beloved wife Catharine survive me, all my worldly substance, all that I am worth, all my worldly estate, I give and bequeath to her for ever, to dispose of it as she may think proper. Be it understood this power of authority it is only during her widowhood: if the estate or property be not alienated during her natural life, or no will by her made in favour of any of my brothers and sisters, or any of

their children, then, and not till then, I give and bequeath unto my sister Mary, or to her heirs for ever, (the land in question.) Those lands or estate devised is not to be sold or mortgaged for ever out of the family, except one brother or sister to the other, or to a brother's or sister's children, as far as the second degree." *Held*, that the widow took an estate in fee, and that the defendants, to whom she had conveyed, were entitled to recover in ejectment. *Bergin v. The Sisters of St. Joseph*, 204.

3. "*Estate.*"— "I, Michael McCabe, of the township of S., south half of lot 24, tenth concession, do make and ordain this my last will and testament in manner and form following: all of my estate, goods, and chattels I give and bequeath to my dear and beloved wife, whom I appoint sole executrix of this my last will and testament, hereby revoking all other and former wills by me at any time heretofore made." *Held*, that the word *estate* clearly passed the testator's land, notwithstanding its connection with the personality. *Henry McCabe v. Mary McCabe*, 378.

4. *Habendum*—*Estate in fee or in tail.*—The testator, who died in 1829, devised as follows: "To my son John Philan I give and devise all that my real estate situate, lying and being lot number five in the fourth concession of Yarmouth, in the London District, containing 200 acres, be the same more or less," (the land in question,) "and also I give and bequeath to my said son John all that my real estate situate, lying and being lot number six in the fourth concession of Yarmouth, in the London District, containing 200 acres, be the same more or less, to

hold unto him, the said John Philan, his heirs and assigns for ever."

"In case of the next surviving male heir arriving at the age of twenty-one years," then he gave to such male heir lot six, "to hold unto the said male heir, his heirs and assigns for ever." To his daughter E. he gave another lot, "to hold unto her, the said E., her heirs and assigns for ever; and in case the said E. shall die without children, then the said lot of land shall be equally divided between the surviving heirs." To another daughter, C., he gave other lands, "to hold to the said C., her heirs and assigns for ever." In case a daughter should be born of his wife, he gave to such daughter other lands, "to hold to said daughter, her heirs and assigns for ever." In case his son John Philan should die before coming of age, he gave lot five to his daughter C., "her heirs and assigns for ever," and lot six to the daughter that should be born of his wife, "her heirs for ever;" and if such daughter should die "previous to her having an heir," then he gave lot six to his daughter E., "her heirs and assigns for ever." In the event of the decease of C. "before she shall have an heir," then he gave lot five to E., "her heirs and assigns for ever." In the event of the death of C., and of the daughter that should be born of his wife, he gave most of the lands devised to them to E., "and her heirs and assigns for ever."

After all these devises he added, "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an encumbrance on the said lots of land,

whatever may be considered a fair allowance, according to the interest of the said estate, to be for the support and benefit of the younger heirs." Afterwards the testator directed that these lots five and six, which he called "the home lots," should be leased "until the heir or heirs arrive at age," and made provision for the event of his wife having a son. *Held*, 1. That John Philan, by the first part of the will, took a fee in lot five, the habendum applying to that lot as well as to lot six; and 2. That the subsequent general clause was not sufficiently definite or intelligible to cut down such estate to an estate tail. *Mary Helen Philan v. Thomas Graham*, 380.

5. *Personalty.*] — Testator by his will, after devising a farm to de-

fendant, his son, in fee, directed that he should support his mother, "and that she shall have one horse, and my buggy, cutter, and harness, to be kept on the place," &c., "and the house and one acre of ground with the orchard all round the house her lifetime." *Held*, that she took the goods mentioned absolutely, not for life only. *Elizabeth McCrary, administratrix of Rosanna McCrary, v. McCrary*, 520.

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WITNESS.

*Right to contradict.*]—See CRIMINAL LAW, 3.

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WORDS (CONSTRUCTION OF).

"*Estate.*" ]—See WILL, 3.

"*Board.*" ]—See FALSE PRETENCES.

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